IN THE
SUPREME COURT OF MISSOURI

SC91109

ARBOR INVESTMENT CO., LLC, et al.,

Appellants,

v.

THE CITY OF HERMANN,

Respondent.

BRIEF OF THE ATTORNEY GENERAL AND STATE AUDITOR AS AMICI CURIAE

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ARGUMENT

I. "User fees" are excluded from the Hancock Amendment's limits on political subdivisions.

In 1980, the people of Missouri assumed for themselves in the Hancock Amendment the authority and responsibility to approve tax increases above certain levels. Mo. Const. Art. X, §§ 18, 22. City councils, county commissions, school boards, and governing bodies of other political subdivisions no longer had the ability to raise taxes as they wished:

> … [P]olitical subdivisions are hereby prohibited ... from increasing the current levy of an existing tax, license or fees, above that current levy authorized by law or charter when this section is adopted without the approval of the required majority of the qualified voters of that county or other political subdivision voting thereon.

Mo. Const. Art. X, § 22(a).

This Court was soon asked whether § 22(a) applied to charges for goods and services provided by the government. *E.g., Roberts v. McNary,* 636 S.W.2d 332 (Mo. banc 1982) Nineteen years ago, in *Keller v. Marion County Ambulance District*, 820 S.W.2d 301 (Mo. banc 1991), the Court recognized that the Hancock Amendment used the broad terms "tax, license or fees," but

read those words in context because "[c]ontext determines meaning." *Id.* at 302. Looking back at its own post-Hancock precedents, the Court concluded that "there are two types of local revenue increases: those subject to the Hancock Amendment and those not subject to the Amendment." *Id.* at 303. Not all increases in "fees" are subject to the Amendment, but only "fee increases that are taxes in everything but name." *Id.* The Constitution still allows, the Court held, "fee increases which are 'general and special revenues' but not a 'tax,'" *id.*, *i.e.*, "user fees" (a term used by the drafters of the Hancock Amendment, as noted in *Keller*, *id.* at 304, n. 8).

At issue in *Keller* were fees charged for ambulance services provided by an ambulance district – "charges … for actual services rendered." *Id.* at 302. The Court held that the Hancock Amendment did not prohibit such organizations from "shifting the burden to the private users of [such] services." *Id.* at 303. But the Court also presaged the dispute here, observing that the "phrase 'license or fees' in § 22(a) indicates an intent to prevent political subdivisions from circumventing the Hancock Amendment by labeling a tax increase as a license or fee." *Id.* at 305. Here, the Court should apply existing Hancock rules – or state new ones – to ensure that political subdivisions cannot circumvent the Hancock Amendment by adding taxes onto legitimate "user fees." It should do so by limiting "user fees" to charges made to recover the costs of providing goods or services (II (a)) and

charges made when offering goods or services for sale in an open market (II (b)), by stating unequivocally that municipal utilities that set rates applied to customers with no non-city alternative higher than the costs of providing the service require are collecting a "tax" subject to the Hancock Amendment (III), and setting out the methodology for determining when a municipal utility's charge constitutes an increased "levy" that requires a public vote (IV).

II. "User fees" are either fees that have a direct relation to the costs of providing services, or that are voluntarily paid when a political subdivision sells in an open market.

In *Zahner v. City of Perryville*, 813 S.W.2d 855, 859 (Mo. banc 1991) – after *Keller* – this Court quoted with apparent approval this language from its previous decisions:

> Fees or charges prescribed by law to be paid by certain individuals to public officers for services rendered in connection with a specific purpose ordinarily are not taxes … unless the object of the requirement is to raise revenue to be paid into the general fund of the government to defray customary governmental expenditures … rather than

> compensation of public officers for particular services rendered.

Leggett v. Missouri State Life Ins. Co., 342 S.W.2d 833, 875 (Mo. banc 1961), quoted in turn in *Craig v. City of Macon*, 543 S.W.2d 772, 774 (Mo. banc 1976), and *Roberts v. McNary*, 636 S.W.2d at 335-36.

The language quoted in *Zahner* from *Roberts* and prior cases, when combined with the holding in *Keller*, suggests that a charge imposed by a municipality can qualify as a "user fee" in one of two ways.

(a) Actual cost of providing service.

The first is if the charge is restricted to "compensation … for particular services rendered," *i.e.,* it is limited to what the services cost. That has been true in many of the § 22(a) cases. For example, in *Zahner* itself the Court held that "[t]here was no payment into the City's general fund," 813 S.W.2d at 859, *i.e.*, the entire amount collected was dedicated to providing the service of flood protection by constructing and maintaining a levee. The Eastern District cited *Zahner* for that point in *In re Fabius River Drainage Dist.*, 35 S.W.3d 473, 482-83 (Mo. App. E.D. 2000). In fact, the Court cited cases back to *Egyptian Levee Co. v. Hardin*, 27 Mo. 495 (Mo. 1858), which the Eastern District described as saying that "amounts raised to be *expended on the property assessed* are not taxes." 35 S.W.3d at 483 (emphasis added).

Applying the same analysis to a municipal utility, Attorney General Ashcroft opined that "Art. X, § 22 does not require voter approval for a political subdivision to increase or impose a user charge or service charge, the purpose of which is merely to defray the cost of providing the service for which the charge is made, rather than to provide additional revenue for the general support of the local subdivision." Attorney General Opinion No. 124-81. The opinion request arose in connection with an increase in utility charges that "directly reflect[ed] the increased cost of energy which must be purchased by the utility from outside sources to supply its own customers." *Id.*

None of those authorities support a premise implicit – at least – in the arguments that the City of Hermann has made in the course of this litigation: that regardless of what costs a political subdivision incurs in providing a good or service, so long as the charge is tied to receipt of the good or service, the charge entirely escapes Hancock Amendment scrutiny. In fact, that premise is inconsistent with the "circumvention" language in *Keller* and with the "paid into the general fund" language quoted in *Zahner*. The Court should reject that premise, giving life to the Hancock Amendment's promise.

Of course, though this and other courts have spoken of the costs to the political subdivision of providing goods or services, they have not required that every penny charged be justified by an expense already incurred;

certainly political subdivisions must be allowed to estimate not just past and current but future costs of providing goods and services – just as private sellers do. And among the costs that are incurred are those relating cash reserves. But utility cash reserves aren't spent on fire trucks or playground equipment. Charges that are imposed in order to gather revenue for "such general fund" expenses cannot be characterized as "user fees" under this approach.

(b) Voluntary purchase in open market.

There is another analytical approach: that taxes are mandatory payments while "user fees" are voluntary. Among "user fees," then, would be charges paid when someone purchases a good or service that the political subdivision offers in an open marketplace, where the payment is in no way mandatory because the purchaser can choose among competitive alternatives.

Twice, attorneys general opined as to such situations. In 1982, Attorney General Ashcroft considered charges imposed by a county hospital. Attorney General Opinion No. 122-82. He pointed out that those were "charges for goods and services which a citizen chooses to purchase." "A citizen needing health care often selects a public hospital operated by a county or other political subdivision to provide that care and contracts with the hospital for medical services and supplies." There, "the relationship between the citizen and the county or political subdivision is a contractual one."

In 1991, Attorney General Webster considered "charges for grave lots in a city-owned cemetery." Citing his own 1985 opinion, the earlier Ashcroft opinion, and *Pace v. City of Hannibal,* 680 S.W.2d 944 (Mo. banc 1984), Attorney General Webster concluded:

> The city or political subdivision may contract with individuals, corporation, and other political subdivisions to provide services and charge the recipient for those services. Providing a grace 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.

Attorney General Webster reiterated that "there is a reasonable probability" that "a court would hold that … rates of a contractual nature" are excluded from the Hancock Amendment.

To date, no court has adopted that "contractual" analysis. But when applied to hospital charges, grave lots, and other sales made or contracts entered into in a competitive marketplace, it makes sense.[1] "Contractual"

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[1] Attorney General Webster also addressed charges imposed by a water district. Attorney General Opinion No. 76-85. He cited *Roberts v. McNary*,

implicitly means that the choice to pay the charge – including any amount that passes through to general revenue, rather than covering the cost of the services themselves – is voluntary. Citizens certainly can go to competing hospitals or buy grave lots in other cemeteries. To the extent acquiring a service from a local political subdivision is truly voluntary – *i.e.*, there is a practical alternative – the charge for it is a "user fee," not a tax.

(c) Exclusive provider of an essential service.

This case, however, does not involve a service as to which the citizen has a real choice. Though consumers have considerable control over the amount of their payments for electricity, that they will make some payment is not within their control in the sense that purchasing grave lots or hospital services would be.

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the 1982 Ashcroft opinion, and *Pace*, (where it was "specifically not asserted that the board lacked the authority to order an increase in utility rates, or that the increase required a vote of the electorate under the terms of the Hancock Amendment,"). 680 S.W.2d at 946 . Attorney General Webster concluded, with no additional analysis, "that water district rates are of a contractual nature and, therefore, that Hancock does not apply." But that opinion does not address whether the water district was selling in a marketplace where the customer had adequate alternatives, and we do not endorse it here.

Going without a connection to the power grid is not a real choice, at least for most citizens and businesses. These days – and at least since 1980 – it is not practical to operate a home or business without electrical power. In any economically realistic sense, that power must come from the power grid.

In the City of Hermann, it appears that the only way to connect to the power grid is through the municipal utility. Indeed under Missouri law most customers of electric power are not allowed to choose their provider – even when an alternative provider is willing to serve the customer at a lower cost. *See, e.g.*, *Farmers' Elec. Co-op., Inc. v. Missouri Dept. of Corrections*, 977 S.W. 2d 266 (Mo. banc 1998). Like the cooperative that prevailed in *Farmers' Electric*, municipal utilities are protected by Missouri statute from competition based in price – *e.g.*, from losing a customer because the general revenue portion of the utility charge is increased. The owner of a structure once served by a municipal utility may only move to a different provider through the intervention of the Public Service Commission – and the basis for that intervention cannot be price:

> Once a municipally owned or operated electrical system, or its predecessor in interest, lawfully commences supplying retail electric energy to a structure through permanent service facilities, it shall have the right to continue serving such

> structure, and other suppliers of electrical energy shall not have the right to provide service to the structure .... The public service commission, upon application made by a customer, may order a change of suppliers on the basis that it is in the public interest for a reason other than a rate differential ....

§ 91.025.2, RSMo 2000. *Compare* § 91.026, RSMo Supp. 2009 (permitting "an aluminum smelting facility" to acquire power elsewhere despite § 91.025.2).

Where a purchaser has a real choice, whatever the political subdivision can charge in the open market is logically treated as a "user fee" outside of the Hancock Amendment. But where the political subdivision is the only legal or practical provider of an essential service – as with a utility that has an exclusive territory – the real "user fee" is limited to the charge that covers costs of providing the service.

III. When a municipal utility that is the sole provider of an essential service sets rates to fund non-utility expenses, it adds to "user fees" taxes that are subject to the Hancock Amendment.

That the increases at issue in *Keller* were user fees may have been an easy question to answer. The ambulance district had a single purpose: to provide services to the residents of the district. There is no indication in the

Court's decision that the district's governing board used or could have used revenues for anything other than to provide ambulance service.[2] Presumably every penny the district collected, by whatever means, was dedicated solely to providing ambulance service.

But municipal utilities are quite different from ambulance and other single-purpose districts. Legally and practically, the municipality can make a "profit" from the utility that can be used to fund general governmental activities. The City of Hermann, for example, operates a utility as a department or division of city government. That gives the city full access to the funds collected in utility bills. And it is undisputed that the city receives more in utility payments than it costs to provide utility services, and that the city has long used those excess funds to cover non-utility expenses.

That is not unique; other cities have similar utilities, and similarly use funds from utility payments to cover non-utility expenses. In fact, the State

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[2] That limited authority does not necessarily mean that a utility district could never impose a tax; the factors in *Keller's* footnote 10 suggest that taxation is possible when a utility district imposes charges that are entirely divorced from actual usage. Those factors, perhaps revised to address the problems discussed here, may be among those appropriately used to identify the exceptional instance when a utility district is imposing a tax in addition to a user fee.

Auditor has found at least seven instances in which a city charges more than the actual cost of utility service and regularly transfers the excess to the general fund to pay other city expenditures. City of Marceline, State Auditor Report No. 2010-40; City of Salem, State Auditor Report No. 2010-08; City of Lebanon, State Auditor Report No. 2008-46; City Utilities of Springfield, Missouri, State Auditor Report No. 2007-80; City of Farmington, Missouri, State Auditor Report No. 2007-11; City of Hermann, Missouri, State Auditor Report No. 2004-88; City of La Plata, Missouri, State Auditor Report No. 2000-126.

The fact of transfers of funds from utility collections to other parts of city government is enough to implicate the Hancock Amendment. So the Auditor has appropriately urged many of those cities to "consult with legal counsel to determine if the funding of transfers is in compliance with Article X, Section 22, Missouri Constitution …." *E.g.*, City of Salem, State Auditor Report No. 2010-08, at 6.

As discussed in II (a), payments made to cover the costs of providing a utility would seem to be the epitome of "user fees" – fees charged for a good or service. Thus standing alone, they would not be within the scope of the Hancock Amendment. But as the Auditor's advice recognizes, an increased charge isn't exempt from a Hancock Amendment vote merely because it is

included in a bill issued by a utility that has exclusive rights to provide a particular service to a particular resident or business.

Charges that are included in utility bills but do not "directly reflect costs" are the equivalent of the taxes Missouri allows cities to impose on utility services. For example, § 144.032, RSMo, authorizes cities to impose sales taxes on electricity and other utility sales: "[A]ny city imposing a sales tax … may by ordinance impose a sales tax upon all sales of metered water services, electricity, electrical current and natural, artificial or propane gas, wood, coal, or home heating oil for domestic use only …." As a sales tax, the amount is set according to what the utility charges. And that amount is set according to what the payer uses. But the sales tax is still a "tax," not a "user fee." The same is true of other "gross receipts" taxes, such as taxes on telephone service. *See*, *e.g.*, Jefferson City Ordinance 17-204(b).[3] Regardless of whether these taxes are imposed equally on all utility users or tied (as they

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[3] "Every person, firm or corporation engaged in the business of furnishing telephone service or telecommunication services for residential, commercial, business, manufacturing, industrial, or for any other purpose in the city, who shall furnish the services within the city, shall pay to the city a tax equal to seven (7) percent of the gross receipts solely derived from the charges for local telephone or telecommunication services in the city as a license tax for conducting such business within the city."

are) to actual usage, they are "taxes" subject to the Hancock Amendment. And there is no reasonable way to characterize the intent of the Hancock Amendment to cover sales and gross receipts taxes on electricity but not parallel assessments built into the charges a city imposes through its municipal utility.

We say that despite the holding in *Pace v. City of Hannibal*. There, years before *Keller* and *Zahner*, this Court held that the portion of a city utility's charges that were paid by the utility to the city's general revenue "in lieu of franchise tax" bore "no similarity to the user fees considered in *Roberts*" (*Pace*, 680 S.W.2d at 948), *i.e.*, to "fees charged for numerous county services, such as parks and building inspection" (*Roberts,* 636 S.W.2d 332, 334). Why? Merely "because the 5 ½ percent factor [was] not charged against the users. They pay the increased rates, to which the percentage factor is then applied." 680 S.W.2d at 948-49. The Court's blithe conclusion that although the Hancock Amendment covers a tax imposed on a private utility it does not cover an increased charge levied by a municipal utility to make a payment "in lieu of tax" is entirely unexplained. In our view, that conclusion is wrong. When a city that has taken over the marketplace for utility services uses its power in that marketplace to require payments that fund general revenue by exceeding the full cost of providing utility services, the Hancock Amendment limits must apply to that portion of the charges

that are the practical equivalent of a tax on utility services, just as it applies to such a tax.[4]

Nor should the court struggle with application of the factors listed in the *Keller* footnote. Those factors are largely vague and ambiguous. As applied to municipal utilities they would be at least problematic.

The first factor is, at least in the utility context, self-contradictory.

> 1) When is the fee paid? – Fees subject to the Hancock Amendment are likely due to be paid on a periodic basis while fees not subject to the Hancock Amendment are likely due to be paid only on or after provision of a good or service to the individual paying the fee.

820 S.W.2d at 304, n. 10. This factor really has two different tests: periodic payment and payment based on usage, each purportedly leading toward an opposite conclusion. In the utility context, charges are always "paid on a periodic basis," assuming that "periodic" means "regularly." And they may always be assessed and paid after the services are provided. The factor is

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[4] Presumably, if a city started to provide electric service through its own utility, the portion of the rate imposed in lieu of any existing tax would not require a public vote because it was not an "increase" in the charge imposed on citizens to pay for general revenue.

thus not helpful in determining what portion of a utility charge is a "tax" rather than a "user fee." Of broader importance, whether payment is required before or after services are rendered or goods delivered is not helpful to the analysis. It makes no difference whether a person renting property from the city pays in advance or after the fact; payment is always a "user fee" (per II (b) above, a charge where the city is operating in the open market).

The next factor is similarly unhelpful, at least when applied to a service as to which the city is the exclusive provider, be it electricity, gas, trash service, or something else.

> 2) Who pays the fee? – A fee subject to the Hancock Amendment is likely to be blanket-billed to all or almost all of the residents of the political subdivision while a fee not subject to the Hancock Amendment is likely to be charged only to those who actually use the good or service for which the fee is charged.

Id. A tax attached to utility bills will be billed to "all or almost all of the residents" of the area the utility serves. This case presents a good example: it appears that anyone in Hermann who is "on the grid" must buy electricity from the single provider, so "all or almost all" residents fall into the category of "those who actually use the … service." Only if there were an effective

alternative – *i.e.*, if the law and the city allowed a competitor to make electric service available to city residents – could use of this factor make sense.

The third factor addresses the amount of the charge:

> 3) Is the amount of the fee to be paid affected by the level of goods or services provided to the fee payer? – Fees subject to the Hancock Amendment are less likely to be dependent on the level of goods or services provided to the fee payer while fees not subject to the Hancock Amendment are likely to be dependent on the level of goods or services provided to the fee payer.

Id. Some use this factor to argue that any fee a political subdivision imposes is not a tax so long as it varies according to the amount of goods or services purchased. But that makes no sense for the reasons discussed in I and II above.

The fourth factor, "Is the government providing a service or good?," will always be easily answered in the case of a utility. But if the amount charged isn't tied directly to the cost of providing the service, then the logic for using this as a factor disappears.

The fifth factor, "Has the activity historically and exclusively been provided by the government?," is better formulated as a look at whether the city is operating in a competitive market, as discussed in II (b).

The analysis for municipal utilities, insofar as the municipality is the exclusive provider of an essential service, should not employ these ambiguous, problematic *Keller* footnote factors. The analysis should be simpler: when a city uses its control over utility services to require payments for purposes of collecting general revenue, it is imposing a "tax".

IV. Though the Hancock Amendment does not bar a municipal utility from continuing to collect for general revenue a portion of its existing rate, it requires a public vote if the utility seeks to increase the portion of the rate that is not being collected to pay the costs of the service.

Here, there is no dispute that the City of Hermann collects more from utility customers than it costs to provide services, then transfers the excess to general funds and uses them for non-utility purposes. So for the reasons discussed in II and III, some portion of the amount charged constitutes a tax rather than a "user fee," and is subject to the requirements of § 22(a). When the remaining, general revenue portion is raised – to use Hancock

Amendment language, when the city "increase[es] … the current levy" – Hermann must comply with the Hancock Amendment.

"Increase" is a critical word. A city may continue to collect revenue pursuant to a "levy authorized by law or charter when [§ 22(a) was] adopted" without a public vote. It is only when the "levy" is "increased" that the Hancock Amendment applies.

That simple conclusion should be obvious from the language of the Hancock Amendment and this Court's precedents. But how to apply it is not so simple. In *Keller*, this Court did not answer that question. And, as discussed in III above, the *Keller* footnote factors do not provide the proper analysis in the municipal utility context.

From the language of the Hancock Amendment and *Keller*, we suggest that the proper analysis for a city making a utility fee increase decision, and for a court evaluating that increase, is to determine whether the "levy" – *i.e.*, the tax portion of the fee – is being increased. That is, simply raising a utility charge that includes both "user fee" and "tax" elements is not enough; there must actually be a change in the tax "levy."

There are two ways of looking at whether there is an "increase" in the "levy": monetary and proportional. The monetary method would be to look at whether the amount projected to be raised for general revenue – as opposed to the amount being raised to pay the costs of providing utility service – will

increase as a result of the new charge. The proportional method would be to look at whether the new charge will result in an increased proportion of the charge being available for general revenue. Given the Hancock Amendment's structure and approach, only the proportional method makes sense here.

The Hancock Amendment first attacks the growth of government expenditures using a monetary approach: it restricts the increase in "total state revenue," so that during times of revenue growth (such as in the 1990s), either the General Assembly cuts taxes, thus reducing revenues, or the State Treasurer issues rebate checks, returning to taxpayers the amount taken in above a revenue ceiling. Mo. Const. Art. X, §§ 17-18. Had the Hancock Amendment been intended to impose a ceiling on the monetary amount that a city or other political subdivision could take in from existing taxes, including those comprising part of utility bills, it would have included a similar plan for those subdivisions. But it did not.

Next, in "Hancock II," Article X, § 18(e), the constitution precludes the General Assembly from "increas[ing] taxes or fees without voter approval that in total produce new annual revenues greater than either fifty million dollars adjusted annually by the percentage change in the personal income of Missouri for the second previous fiscal year, or one percent of total state revenues for the second fiscal year prior to the general assembly's action,

whichever is less." But that monetary ceiling applies only to the General Assembly; the constitution contains no counterpart for political subdivisions.

In § 22(a), the Hancock Amendment imposes not a limit on the ability of political subdivisions to raise a certain amount of revenue, but a limit on their ability to "increase" a "levy." The Amendment does not define "levy," and dictionary definitions are too general to help answer the question of how to determine whether an increase in a utility charge is an "increase" in a "levy" requiring a vote. But when "levy" is used as a noun in Missouri law, it commonly refers to the *rate* of a tax. For example:

- Section 92.030.2 permits Kansas City to impose an "annual rate of tax levy of one dollar on the hundred dollars assessed valuation."
- Section 94.400 speaks of a "levy of one dollar on the one hundred dollars assessed valuation for general municipal purposes," and authorizes a higher levy pursuant to a vote where the ballot asks, "Shall there be a .... cent increase in tax levy on one hundred dollars valuation for general municipal purposes."
- Section 321.241 similarly authorizes a vote on whether to authorize a fire protection district "to

> levy an additional tax of not more than twenty-five cents on the one hundred dollars assessed valuation."

That usage makes sense when interpreting the language of § 22(a), "increasing the current levy … above that current levy." "Levy" there cannot logically mean a new or additional tax. Semantically, only a tax rate can be "increased." And for taxes that existed in 1980 – including property, sales, and, for St. Louis and Kansas City, earnings taxes – the rate decision is the only decision that the governing body of the political subdivision is likely to make.

Interpreting "levy" to mean the tax rate rather than the amount that the tax raises makes particular sense in the context of municipal utilities. Those utilities occupy a place in the local economy that otherwise would be filled by a private utility. As noted above, where charges to private utilities are taxed, it is typically as a percentage of the utility's bills – a gross receipts or sales tax – and not a fee calculated according to the number of customers making payments. Defining the "levy" in terms of the percentage of utility payments that will come into city coffers for use in other areas of city government provides a parallel to taxation of private utility payments.

The question before a city council, then, is whether the city is increasing the percentage of the charges imposed for utility services that will

be directed to general city services, as opposed to simply covering current and anticipated increases in utility costs. If the percentage will increase, the city must put the matter to a public vote. To give a hypothetical example: A city that spends $900,000 to generate or purchase electricity and receives $1,000,000 in revenue from its customers for the purchase of that electricity is imposing a "tax" of 10% in its utility charges. If the cost of generating or purchasing the electricity goes up 10%, to $990,000, then the city can increase the utility charge 10%, generating revenue of $1,100,000. The "levy" has not been increased: it remains at 10%, though the amount actually received for general revenue increases.

That does not mean, however, that a utility customer – *i.e.*, a taxpayer, paying the allegedly increased "general revenue" or "tax levy" portion of the utility charge – can simply look at receipts after an increase, say that they are more, proportionately, than under the prior charge, and prevail in a Hancock challenge. The Hancock Amendment's approach to restricting increased levies by political subdivisions is to test the decisionmaking of the governing body of the subdivision. So what a court must consider in response to a Hancock challenge to an increased fee is what the projected result of the fee was at the time the governing body voted to impose the increase. If the information available to the governing body shows that the new charge will not change the user fee/general revenue proportions, then the governing body

is free to act without a public vote, even if the projection later proves to have been wrong. Similarly, the governing body is not excused from passing an increase without a public vote merely because the increase ultimately results in less than the projected excess transferable to general revenue.

That presumes, of course, due diligence by the governing body. They cannot ignore obvious defects in the data, accept spurious projections, or demand only a superficial analysis – and a taxpayer should be able to challenge a levy adopted with an inadequate basis. On the other hand, a reviewing court must understand that projections necessarily build in some cushion both to ensure that the "user fee" portion of the charge remains sufficient to cover the increased costs, and to accommodate fluctuations in the cost of utility services. That includes not just the cost of generating or purchasing electricity, but the full cost to the city of transmitting it to homes and businesses.

What we propose is an objective test, based on the data before the decision-maker. Some of the language in *Keller* might suggest that there is also a subjective intent element to the analysis. But the Hancock Amendment does not contemplate evaluating intent. It promises the opportunity to vote on tax increases regardless of whether a challenger can prove that the individual government officials voting to enact a change in a utility charge intended to change the user fee/general revenue split.

We do not opine as to whether, using this approach, Arbor Investment or the City of Hermann would prevail. But the undisputed facts before the circuit court show that funds from utility charges are being transferred into general revenue and that the amount of those transfers has grown. That is enough to implicate the Hancock Amendment and to require a more detailed analysis than that given by the circuit court. The Hancock Amendment does not allow the city to take advantage of its position as the exclusive provider of an essential service to circumvent the Hancock Amendment by raising rates for that service to fund government generally, even when the city sees shortfalls in sales or property tax revenue.

CONCLUSION

For the reasons stated above, the Court should hold that the Hancock Amendment excludes as "user fees" only fees that are either dedicated solely to payment of the costs of providing services or are charges for nonessential services or services that a city offers in the open market, that the Hancock Amendment does not exclude taxes that are tacked onto "user fees" in order to avoid the requirement of a public vote, and that a Hancock Amendment challenge to an increase in a charge by a municipal utility must be based on a change in the proportion of charges imposed by the utility that is reasonably projected to exceed the costs of providing utility services.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE WITH RULE 84.06(b) AND (c)

The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains - _____ words.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

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