IN THE SUPREME COURT
STATE OF MISSOURI

No. SC 84107

MISSOURI HOTEL AND MOTEL ASSOCIATION, et al.

Appellants

v.

CITY OF ST. LOUIS, et al.

Respondents

Appeal from the Circuit Court of the City of St. Louis, Missouri
The Honorable Robert H. Dierker
Division 3

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

POINTS RELIED ON

I.

THE STATUTE OF LIMITATIONS TO RAISE THE ISSUE OF THE VALIDITY OF SECTION 67.1571 EXPIRED PRIOR TO INTERVENOR/RESPONDENT RAISING THE ISSUE IN ITS AMENDED ANSWER.

Hammerschmidt v. Boone County, 877 S.W.2d 98 (Mo. banc 1994)

Section 516.500, RSMo 2000

Murphy v.Caron, 536 S.W.2d 30 (Mo banc 1976)

Butler v. Mitchell Hugeback, Inc., 895 S.W.2d 15 (Mo. banc 1995)

II.

THE AFFIRMATIVE DEFENSE RAISING THE ISSUE OF THE VALIDITY OF SECTION 67.1571 WAS NOT RAISED IN A TIMELY MANNER NOR PROPERLY PLED AND THUS THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO STRIKE THE AFFIRMATIVE DEFENSE.

Christiansen v. Fulton State Hospital, 536 S.W.2d 159 (Mo. banc 1976)

ITT Commercial Finance v. Mid-America Marine, 854 S.W.2d 371 (Mo. banc 1993)

Rule 55.08

III.

HOUSE BILL 1636, LAWS 1998, WHICH ENACTED SECTION 67.1571, DID NOT VIOLATE THE PROCEDURAL REQUIREMENTS OF ARTICLE III, SECTIONS 21 AND 23 OF THE MISSOURI CONSTITUTION.

C.C. Dillon Company v. City of Eureka, 12 S.W.3d 322 (Mo. banc 2000)

Home Builders Association of Greater St. Louis v. State, 75 S.W.3d 267 (Mo. banc 2002)

Stroh Brewery v. State, 954 S.W.2d 323 (Mo. banc 1997)

Westin Crown Plaza Hotel Company v. King, 664 S.W.2d 2 (Mo. banc 1984)

ARGUMENT

Introduction

To insure the certainty of our statutes and to preserve confidence in our laws, this Court and the General Assembly have agreed that procedural challenges to the enactment of statutes must be limited as to time. Thus, this Court developed, and the General Assembly codified, a statute of limitations for the raising of such claims. Without such a statute of limitations, the validity of a statute would never be certain and this Court could be presented with claims literally dating back a hundred years. The current statute of limitations must be enforced to preserve our system of government under laws.

In this case, the statute of limitations to challenge the validity of Section 67.1571 expired prior to Intervenor/Respondent raising the validity in an out-of-time, improperly pled affirmative defense. Intervenor/Respondent did not prove, or attempt to prove, or for that matter even plead, that it fell within any exception to the statute of limitations. Thus, the trial court's rejection of the bar of statute of limitations should be reversed.

Further, the affirmative defense of unconstitutionality itself was untimely raised at the end of trial and was not pled with any specificity. Under this Court's decisions and Rule 55.08, the affirmative defense should have been stricken by the trial court as deficient. This Court should reverse the trial court and dismiss the Intervenor/Respondent's affirmative defense of invalidity of Section 67.1571.

Finally, even if the issue of constitutionality was properly raised, Section 67.1571 was properly enacted and complies with the requirements of Article III, Sections 21 and 23. The Intervenor/Respondent did not overcome the presumption of validity that this Court has consistently upheld. Section 67.1571 fits within the subject of House Bill 1636, Laws 1998, and thus its validity should have been upheld. This Court

should reverse the decision of the trial court, and uphold the validity of Section 67.1571.

I.

THE STATUTE OF LIMITATIONS TO RAISE THE ISSUE OF THE VALIDITY OF SECTION 67.1571 EXPIRED PRIOR TO INTERVENOR/RESPONDENT RAISING THE ISSUE IN ITS AMENDED ANSWER.

In Missouri, statutes of limitations are to be favored and exceptions are to be strictly construed. The burden placed upon the party seeking an exception, in this case the Intervenor/Respondent, is to prove that the party falls within such an exception. In the current case, Intervenor/Respondent has not proven that it falls within an exception. Nor did the trial court point to any evidence (because there was no evidence presented) that would support its decision that Intervenor/Respondent falls into any exception to the statute of limitations. The failure of Intervenor/Respondent to introduce any evidence, make any allegation, or even properly plead before the trial court that they fall within an exception dooms their claim to failure. The claim of unconstitutionality of the statute was untimely and brought outside of the statute of limitations. The trial court's decision, which is supported by no evidence, much less substantial evidence, cannot be upheld: Under the *Murphy v. Caron*, 536 S.W.2d 30 (Mo banc 1976) standard of review, the trial court decision must be reversed.

This Court first established a statute of limitations on a procedural challenge to the validity of a statute in *Hammerschmidt v. Boone County*, 877 S.W.2d 98 (Mo. banc 1994). In establishing that statute of limitations, the Court stated:

> Where no individual substantive rights are at stake, a claim that the bill is defective in form should be raised at the first opportunity. I would hold

> that an attack on the statute for such defects must be filed no later than the adjournment of the next full regular legislative session following the bill's effective date as law unless it can be shown that there was no party aggrieved who could have raised the claim within that time. In the latter circumstances, the complaining party must establish that he or she was the first person aggrieved or in the class of first persons aggrieved, and that the claim was raised not later than the adjournment of the next full regular legislative session following any person being aggrieved.

Id. at 105.[1]

The opinion in *Hammerschmidt* was issued by this Court on March 17, 1994, and stands today as this Court's established precedent on the statute of limitations for challenges based upon the alleged violation of procedural enactment provisions of the Missouri Constitution.

Shortly after the decision in *Hammerschmidt*, the General Assembly passed Senate Bill 558, Laws 1994, a legislative statute of limitations effectively adopting this Court's decision in *Hammerschmidt*. That

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[1] Judge Holstein wrote this portion of the opinion in the *Hammerschmidt* case which was concurred in by Judges Covington, Benton and Robertson; thus a four Justice majority of the Court adopted this statute of limitations. *Id.*

new statute of limitations, codified at Section 516.500, which provides that:

> No action alleging a procedural defect in the enactment of a bill into law shall be commenced, had or maintained by any party later than the adjournment of the next full regular legislative session following the effective date of the bill as law unless it can be shown that there was no party aggrieved who could have raised the claim within that time. In the later circumstance, the complaining party must establish that he or she was the first person aggrieved or in the class of first persons aggrieved, and that the claim was raised not later than the adjournment of the next full regular legislative session following any person being aggrieved. In no event shall an action alleging a procedural defect in the enactment of a bill into law be allowed later than five years after the bill or the pertinent section of the bill which is challenged becomes effective.

Section 516.500. [2] (Emphasis supplied.)

Section 67.1571 was passed during the 1998 session of the General Assembly. During that session, witnesses for Intervenor/Respondent admitted to knowledge of and opposition to the proposed amendment. (Supp. L.F. 3-4). It is therefore impossible for Intervenor/Respondent to argue that anyone, much less ACORN, was not aware of, opposed to and aggrieved by Section 67.1571 at its time of enactment. Yet the challenge to Section 67.1571 was not brought by the Intervenor/Respondent ACORN

[2] All statutory cites are to RSMo 2000 unless otherwise noted.

until February 9, 2001. (L.F. 86).

Significantly, the direct testimony of ACORN witnesses at trial demonstrated that at the time of enactment and immediately thereafter, the Intervenor/Respondent ACORN itself was in the process of attempting to pass a Living Wage Ordinance which clearly conflicted with the provisions of Section 67.1571. (Tr. 79). Craig Robbins, the Executive Director of ACORN, specifically testified that the "most recent reincarnation of the Living Wage Campaign"[3], began in November of 1998. *Id.* Clearly this represents the latest possible date at which Intervenor/Respondent ACORN became an aggrieved party for purposes of bringing a challenge under the statute of limitations. Just like the litigants in the cases referred to in the Respondents' Brief, page 16, the Intervenor/Respondent ACORN had standing to bring a judicial challenge against Section 67.1571 in November of 1998, as well as in August of 1998 when Section 67.1571 became effective.

Statutes of limitations in Missouri are to be interpreted in a manner favoring their application. As this Court has stated:

> Statutes of limitation are favored in the law and cannot be avoided unless the party seeking to do so brings himself strictly within a claimed exception. *Hunter v. Hunter*, 237 S.W.2d 100, 104 (Mo. 1951). Statutory exceptions are strictly construed and are not to be enlarged by the courts upon consideration of apparent hardships.

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[3] Section 67.1571 and this "reincarnation" of the Living Wage Campaign of ACORN both, in turn, grew out of the 1997 Initiative Campaign by ACORN for a statewide Living Wage.

Butler v. Mitchell Hugeback, Inc., 895 S.W.2d 15, 19-20 (Mo. banc 1995). Within Section 516.500, there are two provisions which are of particular importance in this regard.

First, in order to fall within the exception to the bar of the statute of limitations, a party must show that there is "no party aggrieved who could have raised the claim within that time." *Hammerschmidt*, at 105, and Section 516.500. Clearly, many supporters of local minimum wages were "aggrieved"upon enactment of this prohibition on such local minimum wages. Although knowledge and notice are not required elements for purposes of Section 516.500, ACORN clearly was well aware of their "aggrievement."

Being aggrieved by the legislation is not, however, the only issue; one who is aggrieved must also not be able to raise the claim within that time frame. Clearly Intervenor/Respondent ACORN could have raised the claim at any time after the enactment of Section 67.1571. They were aggrieved and they knew it. The Executive Director of ACORN, Craig Robbins, stated that ACORN's Local Living Wage Campaign, solely devoted to passing a Local Living Wage Ordinance, such as that prohibited by Section 67.1571, began in November of 1998. (Tr. 79). It is clear that ACORN was aggrieved and could have (indeed, should have) brought an action challenging the enactment of Section 67.1571 when they began their Living Wage Ordinance Campaign in November of 1998. Based upon this Court's opinion in *Hammerschmidt* and Section 516.500, however, the statute of limitations for bringing such action expired at the adjournment of the 1999 legislative session.

Hammerschmidt and Section 516.500 both state that when any party "could have raised the claim" the statute begins to run. It is clear that under this Court's decisions that Intervenor/Respondent ACORN could have raised the claim in 1998, and certainly before the end of the 1999 legislative session.

The ACORN position is no different than the Plaintiff in *Missouri Health Care Association v. Attorney General*, 953 S.W.2d 617 (Mo. banc 1997). The Court in that case reviewed the enactment of new Section 407.020 prior to it having been applied to the members of the *Missouri Health Care Association.* The Court stated:

> MHCA has alleged that amended Section 407.020 is unconstitutional and that it is affecting its member's businesses: therefore, MHCA's petition places a legally protectable interest at issue. *Id*. MHCA had contended that 'its members were uncertain about what disclosure was required by subsection 407.020.5 and that they operated under the threat of the enforcement provisions contained in amended Section 407.020.'

Id at 620. (emphasis supplied). This Court found that since MHCA had presented a question regarding constraints of its business under the new legislation, that it should raise the claim of unconstitutionality against Section 407.020 at the time it did. *Id.* ACORN was in precisely the same position in 1998. There is no question the case could have lawfully been brought. As this Court stated in *Lincoln Credit Co. v. Peach,* 636 S.W.2d 31 (Mo. banc 1982):

> Such a question constitutes a justiciable controversy under the Declaratory Judgment Act even though no enforcement of that statute has yet been commenced against that party.

Id. at 34 citing *State ex rel. Eagleton v. McQueen,* 378 S.W.2d 449, 452 (Mo. banc 1964).

Accordingly, under this Court's previous decisions and the plain language of Section 516.500, Intervenor/Respondent ACORN could have raised its claim in August or November of 1998 and before

the end of the 1999 regular session of the Missouri General Assembly. The testimony of Craig Robbins confirms this fact. The running of the statute of limitations in 516.500 began upon its enactment and, in any event, no later than November 1998. Accordingly, ACORN's claim that Section 67.1571 was improperly enacted is out of time and was not properly before the trial court in this case. For this reason, this Court should reverse the trial court's decision.

The second component of the test for exception from the statute of limitations in *Hammerschmidt* and Section 516.500 is that "the complaining party must establish that he or she was the first person aggrieved." *Hammerschmidt*, at 105, and Section 516.500 (emphasis supplied). This is only consistent with the position that exceptions are strictly construed and that statute of limitations are favored. The burden falls, not only under case law but also under the express language contained in the statute, squarely upon Intervenor/Respondent ACORN to establish, by pleading and evidence (or at least in some manner), facts that demonstrate it was "the first person aggrieved."

Intervenor/Respondent ACORN pled no facts and offered no evidence to show that it was "the first person aggrieved" before the trial court. This is, of course, not surprising: There can be no such evidence adduced. The adverse effect of Section 67.1571 on the interests of many groups and individuals, including ACORN, was immediate upon its enactment into law. Every municipality (such as Respondent City of St. Louis) effected by the prohibition was "aggrieved" by this withdrawal of authority from their jurisdiction. Workers and unions were similarly aggrieved by this ban on their plans to enact local minimum wage ordinances in Missouri. As a result, the assertions of ACORN regarding Section 67.1571 are unquestionably barred under the statute of limitations. While in general this Court defers to the trial court as the finder of fact, there must be at least some facts or allegations pled and proved before that Court for

this Court to defer to. See *e.g. Businessmen's Assurance Co. of Am. v. Graham*, 984 S.W.2d 501, 506 (Mo. banc 1999). Such facts can be in stipulations, pleadings, exhibits or depositions. *Id.* However, under *Murphy v. Caron*, 536 S.W.2d 30 (Mo. banc 1976), the decision of the trial court cannot be affirmed unless it is supported by substantial evidence. *Id.* at 32. In the current matter there is no evidence upon which any court could find that Intervenor/Respondent fell within an exception to the statute of limitations contained in *Hammerschmidt* and Section 516.500.[4]

Under this Court's decisions in *Butler v. Mitchell-Hugeback*, *Businessmen's Assurance* and *Murphy Caron*, the burden is on Intervenor/Respondent ACORN and the trial court's decision must be based upon a properly pleaded exception, and evidence to support that exception, to the statute of limitation. No proper pleading was submitted and no evidence was proffered, much less admitted, before the trial court on this issue. The trial court erred in refusing to strike or deny Intervenor/Respondent ACORN's affirmative defense of unconstitutionality.

This Court should reverse the trial court and find that no evidence supports any exception to the statute of limitations, and thus consideration of the issue of the validity of Section 67.1571 was foreclosed

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[4] While presenting nothing on this crucial issue, counsel for Intervenor/Respondent, when asked by the trial court if there was more evidence to be submitted, replied, "I think we've got it all in." (Tr. 141).

by the statute of limitations in Section 516.500 and this Court's *Hammerschmidt* decision.

II.

THE AFFIRMATIVE DEFENSE RAISING THE ISSUE OF THE VALIDITY OF SECTION 67.1571 WAS NOT RAISED IN A TIMELY MANNER NOR PROPERLY PLED AND THUS THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO STRIKE THE AFFIRMATIVE DEFENSE.

Intervenor/Respondent cannot deny the fact that it did not raise the issue of constitutionality of Section 67.1571 until the very last moment. With the last day of trial scheduled for February 1, 2001, Intervenor/Respondent only filed its Motion for Leave to File an Amended Petition on January 31, 2001. (L.F. 66). In fact, the Amended Answer was not actually filed with the Court until February 9, 2001. (L.F. 69). Furthermore, the Court closed the evidence during the February 1 hearing after assertion by counsel for Intervenor/Respondent ACORN that "I think we've got it all in." (Tr. 141).

Just as in *Christiansen v. Fulton State Hospital*, 536 S.W.2d 159 (Mo. banc 1976) the Intervenor/Respondent ACORN did not raise the question of constitutionality of Section 67.1571 until the end of the trial. In *Christiansen*, this Court found that such an issue was not properly raised (when raised at the end of trial), and "no constitutional issue is presented and we have no jurisdiction of this appeal." *Id.* at 160.

This Court should follow its holding in *Christiansen*, reverse the trial court and remand to the trial court with instructions to grant the Motion to Strike the untimely affirmative defense of unconstitutionality raised by Intervenor/Respondent ACORN.

Furthermore, the Intervenor/Respondent's affirmative defense fails to properly specify the violation

that it is alleging regarding Section 67.1571. As referenced in Appellant's initial Brief, pages 20-23, it is clear that the affirmative defense pled by Intervenor/Respondent did not conform to Rule 55.08 and this Court's decisions interpreting that rule. See e.g., *ITT Commercial Finance v. Mid-America Marine*, 854 S.W.2d 371 (Mo. banc 1993). The entire affirmative defense as specified by Intervenor/Respondents stated as follows:

> Missouri Revised Statute, Section 67.1571 is invalid, as its inclusion in the Community Improvement District Act, House Bill No. 1636 (1998), violates section 21 and section 23 of Article III of the Missouri Constitution.

L.F. 83.

This language does not specify which of the numerous procedural requirements contained in Article III, Section 21 (style of law, passed by bill, amended in its passage to change original purpose or reading by title on three different days) or in Article III, Section 23 (multiple subject or clear title) of the Missouri Constitution are being addressed. While Appellant addressed all of the arguments it could possibly fathom in its Suggestions before the trial court, it is not the responsibility of the Appellant, the Petitioner below, to attempt to determine what is the issue raised in an affirmative defense. That burden lies with the person who raises the affirmative defense. *ITT* at 384. Failure to meet such burden relieves both the opposing party and the trial court of any necessity to even consider the matter. The trial court erred in refusing to so find, and is considering the untimely and insufficiently pleaded affirmative defense of Intervenor/Respondent.

Thus, this Court should reverse the trial court and find that Intervenor/Respondent failed to timely raise or properly plead its affirmative defense of procedural unconstitutionality and thus the issue of the

constitutionality of Section 67.1571 is not properly before the trial court.

III.

HOUSE BILL 1636, LAWS 1998, WHICH ENACTED SECTION 67.1571, DID NOT VIOLATE THE PROCEDURAL REQUIREMENTS OF ARTICLE III, SECTIONS 21 AND 23 OF THE MISSOURI CONSTITUTION.

Intervenor/Respondent has failed to even acknowledge this Court's general rule that a law must be presumed constitutional. This long-standing rule was just recently reaffirmed by this Court in *Home Builders Association of Greater St. Louis v. State*, 75 S.W.3d 267, 269 (Mo. banc 2002). "Attacks against legislative action founded on constitutionally imposed procedural limitations are not favored." *Id.* quoting *Carmack v. Director, Missouri Department of Agriculture*, 945 S.W.2d 956, 959 (Mo. banc 1997).

Additionally, routine amendments, additions and alterations to a bill such as HB 1636 are not prohibited by the Constitution. For example, in *Stroh Brewery v. State*, 954 S.W.2d 323 (Mo. banc 1997) the Court found that "alterations that bring about an extension or limitation of the scope of the bill are not prohibited: Even a new matter is not excluded if germane." *Id.* at 326. Clearly, contrary to Intervenor/Respondent's arguments, this Court has found that additions to a bill during the legislative process do not *per se* violate Article III, Sections 21 or 23.

This Court's decision in this case is controlled by *C.C. Dillon Company v. City of Eureka*, 12 S.W.3d 322 (Mo. banc 2000). In *C.C. Dillon*, this Court found that a statute "relating to transportation" could encompass the addition of billboard regulations because the burden under Article III, Section 21 is on the challenger to demonstrate that the amendment is "clearly and undoubtedly not germane." *Id.* at 327.

In *Dillon*, this Court conducted an in depth review of the purpose and intent of the bill, not simply the title, and found that billboards were sufficiently related to the purpose of the bill and thus were germane. *Id.*

This is the same analysis that should have been conducted by the trial court in the current matter, but was not. The purpose of Section 67.1571 is germane and related to the purposes of the Community Improvement District Act, which is economic development and job creation via economic incentives contained in the Community Improvement District Act.[5] The provisions of Section 67.1571 serve as a tool to protect such developments and job creation. This is precisely the test for determining whether there are multiple subjects:

> The test to determine if the title of a bill contains more than one subject is

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[5] Due to the Court closing the record of evidence on February 1, 2001 and due to the late pleading of the affirmative defense related to the constitutionality of Section 67.1571, Appellant was effectively precluded from developing and presenting additional evidence to show the legislative intent of the amendment of House Bill 1636 to include Section 67.1571. However, even on an intuitive level it can be understood that the absence of such a prohibition on local minimum wages would call into question the efficacy of providing state job creation economic incentives in a Community Improvement District Act, while at the same time allowing a locality to force employers to pay higher (or in this case prohibitively higher) wages to their employees to qualify for such job creation benefits. The amendment prevents a city from taking the intended state economic development benefits and turning them around to impose a crushing burden on businesses, effectively negating the intended low-end job creation purposes of the Community Improvement District Act.

> whether all provisions of the bill fairly relate to the same subject, have natural connection therewith or are incidents or means to accomplish its purpose. (Emphasis supplied.)

Westin Crown Plaza Hotel Company v. King, 664 S.W.2d 2, 6 (Mo. banc 1984) citing *State ex rel. Williams v. Marsh*, 626 S.W.2d 223, 228 (Mo. banc 1982).

There is no change in original purpose and no multiple subjects in House Bill 1636. The analysis conducted by this Court in *C.C. Dillon* controls the current case. Such an analysis reflects that Section 67.1571 was enacted in compliance with Article III, Sections 21 and 23 of the Missouri Constitution. The trial court's judgment to the contrary should be reversed by this Court and Section 67.1571 should be held to be validly enacted.

CONCLUSION

The statute of limitations set forth in *Hammerschmidt* and Section 516.500 controls in this case. Enforcement of this statute of limitations is necessary to preserve and protect our system of laws and to insure that procedural constitutional challenges are not brought years and years after the enactment of a statute. Intervenor/Respondent ACORN failed to raise its claim in a timely manner and that claim is barred, not only before the trial court but before this Court on appeal. This Court should reverse the trial court and dismiss the affirmative defense relating to the constitutional validity of Section 67.1571, as having been raised out of time under *Hammerschmidt* and Section 516.500.

This Court should additionally find that the affirmative defense was raised too late in the proceeding to be appropriately considered by the trial court, and that it was in any event improperly pleaded under Rule 55.08. Thus, the affirmative defense should have been stricken and dismissed by the trial court; this Court

should reverse the trial court's decisions and strike the affirmative defense.

Finally, Section 67.1571 was enacted in full compliance with the provisions of Article III, Sections 21 and 23, and it enjoys a presumption of validity. Intervenor/Respondents present no evidence to carry the considerable burden of proving it was not validly enacted. This Court's analysis in *C.C. Dillon* supports Section 67.1571 against the allegations raised by Intervenor/Respondent. Thus, this Court should reverse the judgment of the trial court and affirm the validity of Section 67.1571.

Respectfully submitted,

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CERTIFICATE OF ATTORNEY

I hereby certify that the foregoing Brief complies with the provisions of Rule 55.03 and complies with the limitations contained in Rule 84.06(b) and that:

(A) It contains 4, 884 words, as calculated by counsel's word processing program;

(B) A copy of this Brief is on the attached 3 ½ disk; and that

(C) The disk has been scanned for viruses by counsel's anti-virus program and is free of any virus.

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the above and foregoing document were sent U.S. Mail, postage prepaid, to the following parties of record on this 15th day of July, 2002:

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