IN THE SUPREME COURT OF MISSOURI

CITY OF DESOTO, A POLITICAL SUBDIVISION OF THE STATE OF MISSOURI, AND JAMES ACRES,

Plaintiffs-Appellants,

v.

JEREMIAH W. NIXON, GOVERNOR OF THE STATE OF MISSOURI, AND CHRIS KOSTER, ATTORNEY GENERAL OF MISSOURI

Defendants-Respondents.

_____SC94746_____

APPEAL FROM THE CIRCUIT COURT OF COLE COUNTY
The Honorable Patricia Joyce, Judge

APPELLANTS' REPLY BRIEF

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INTRODUCTION

Appellants and Respondents have differing views as to which caselaw, in reality, controls the outcome of this case. Respondents' argument, premised almost entirely on City of St. Louis v. State (382 S.W.3d 905 (Mo. banc 2012)) (hereinafter City of St. Louis), is fatally flawed, for City of St. Louis (discussed in more detail *infra*) analyzed legislation that did not have population classifications or characteristics. Jefferson County Fire Protection Districts Association v. Blunt (205 S.W.3d 866 (Mo. banc 2006)) (hereinafter "Jefferson County) controls the outcome of this case because Jefferson County analyzed

legislation whose distinguishing classification was population. This Court did not make a clear distinction between analyzing legislation that has only population classifications and legislation that has non-population, open-ended classifications. Furthermore, City of St. Louis did not say that the three part test as presented in Jefferson County did not apply; this Court applied the three part test to the facts and test presented.[1] Appellants maintain this position, as it is the city and county population classifications, when coupled with the other classifications, that draw the reader's attention to DeSoto, Missouri. However, for purposes of this Reply Brief, Appellants will discuss the potentially unique nature of this case's legislation against the backdrop of special legislation case law within the past decade. Because Appellants have already detailed in full Jefferson County in their first Brief, Appellants will only detail herein *infra* the City of St. Louis case.

Following this Court's decisions in Jefferson County and City of St. Louis, this Court, to Appellants' knowledge, has not been presented with what Appellants will call a "hybrid special law" scenario—one in which population classifications and open-ended,

[1] Also, Appellants note that cases alleging special legislation involving the City of St. Louis have rarely resulted in the legislation being held unconstitutional because the City of St. Louis is given specific recognition in Mo. Const. art. VI, § 31, as being *sui generis*, a unique entity in a unique class, legislation enacted to address the class of which the City of St. Louis is the only member is no special legislation within the meaning of Mo. Const. art. III, § 40. *See* Treadway v. State, 988 S.W.2d 508 (Mo. 1999).

non-population characteristics or classifications are presented in the challenged legislation. Such is the case in this matter now before the Court. As such, the Court has never made a distinction between challenged special legislation that has population classifications and challenged special legislation that has what Respondents have called "political decisions". Jefferson County clearly controls challenged special legislation that has population classifications. But when challenged special legislation also has what Respondents have called "political decisions", does City of St. Louis alone control the Court's analysis as to those classifications or characterizations? No, for the reasons stated herein, only open-ended, non-population characteristics that are "unilateral political decisions"[2] can be subject, in part, to the ***indirect*** ruling stated in City of St. Louis.

In this Reply Brief, Appellants will address Respondents' argument that City of St. Louis should control the entire analysis of the legislation, and Appellants, after demonstrating the fallacies in such an argument, will propose an analytical framework for this Court when presented with a "hybrid special law" scenario: Jefferson County controls the analysis of the population classifications and non-population, open-ended

[2] Unilateral political decisions are those types of decisions that a government entity or political subdivision can make using their own discretion and that are within their lawful powers, statutory or otherwise—operating a fire department, having a residency requirement for employees, or keeping a school district accredited. These are by their nature non-population, open-ended characteristics.

classifications, and City of St. Louis should control the analysis of only classifications that Appellants define as "unilateral political decisions". After discussing the framework of this "hybrid" test, Appellants will present why this "hybrid" test is the best means to pronounce the public policy of the State of Missouri as it concerns special legislation which contains both population classifications, non-population, open-ended classifications, and "unilateral political decisions".

ARGUMENT

I. IF THIS COURT HOLDS THAT BOTH JEFFERSON COUNTY AND CITY OF ST. LOUIS CONTROL THE DECISION OF THIS COURT IN THIS MATTER, THEN JEFFERSON COUNTY SHOULD BE THE CONTROLLING CASELAW IN THIS MATTER IN REGARD TO POPULATION CLASSIFICATIONS, AND CITY OF ST. LOUIS SHOULD BE THE CONTROLLING CASELAW IN THIS MATTER FOR ONLY THOSE CLASSIFICATIONS THAT ARE UNILATERAL POLITICAL DECISIONS.

Respondents' brief was heavy on theory and fatally light on the law. Respondents' argument is premised almost entirely on the alleged "***indirect***[] . . . additional insight as to how to conduct 'special law' analysis . . ." provided by this Court in City of St. Louis v. State (382 S.W.3d 905 (Mo. banc 2012)). (Respondents' Brief at 21, emphasis added) Throughout the entire brief, Respondents argue that **all** of RSMo. Section 321.322.4's classification characteristics should not be analyzed as to their current effect, but rather

whether others may fall into the classification at some later time. (Respondents' Brief at 21-22, 29-30).

City of St. Louis recognized and did not distinguish itself from Jefferson County, thereby Jefferson County is still controlling even if population classifications are not presented. City of St. Louis also specifically applied the three part test from Jefferson County without imposing any additional considerations. 382 S.W.3d at 914. City of St. Louis is not the controlling case law in this case because City of St. Louis analyzed legislation that had as its only defining characteristics such characteristics that were "unilateral political decisions" concerning the political subdivision at issue (a city), whereby other political subdivisions (cities) could fall or avoid falling within the ambit of that statute by taking or refraining from taking certain unilateral political steps.

In contrast, Jefferson County analyzed legislation that did not have "unilateral political decisions" as characteristics, whereby the political subdivision at issue had no way to avoid falling within the ambit of the statute in this case or to control whether they could fall within the ambit of the statute. Such is the case, at least in part, in this matter: RSMo. Section 321.322.4 contains characteristics that a city cannot unilaterally avoid—population of both the city and the county, creation or changes in the fire protection district's boundaries so that it may entirely surround a city, and formation of a charter government. The remaining two characteristics are wholly within the power of the city—becoming a third class city upon reaching the requisite population (RSMo. Section 72.030) and forming a municipal fire department (RSMo. Section 77.190). As such, a majority of the

characteristics are those which the political subdivision at issue has no way to avoid so as to not fall within the ambit of the statute in this case.

City of St. Louis v. State

The facts of Jefferson County and City of St. Louis underscore the different reasoning used in City of St. Louis to uphold the challenged law in that case: In 2010, the Missouri Legislature enacted RSMo. Section 320.097. This law was applicable to **all** Missouri cities and provided that "no employee of a fire department who has worked for seven years for such department shall, as a condition of employment, be required to reside within a fixed and legally recorded geographical area of the fire department if the only public school district available to the employee within such fire department geographical area is a public school district that is or has been unaccredited or provisionally accredited in the last five years of such employee's employment." *Id.* at 909-10, 914-15.

St. Louis is a constitutional charter city, and all the parties conceded that the city's public schools were at the time of suit not fully accredited and that the City's charter required all employees to reside in the City beginning no later than 120 days after the date of their employment and throughout employment thereafter. RSMo. Section 320.097 applied to the City of St. Louis. The City of St. Louis filed suit seeking declaratory and injunctive relief to prevent application of RSMo. Section 320.097 to the City of St. Louis. The City of St. Louis argued that RSMo. Section 320.097 was a special law. *Id.* at 909-10.

Cross Motions for Summary Judgment were filed. The trial court granted the State's Motion for Summary Judgment on the City's allegations that RSMo. Section 320.097 was a special law, finding that as the law applied to **any city** that has a residency requirement and an unaccredited school district. The trial court also found that the law was based on opened-ended characteristics, and, therefore, was a general rather than special law. The City of St. Louis and the State both appealed various aspects of the ruling.[3] *Id.* at 909-10.

This Court's decision in City of St. Louis discussed whether the statute at issue was special legislation. This Court reiterated what it had held in Jefferson County and also cited the specific provisions of the Missouri Constitution under article III, section 40, subdivisions 21, 28 and 30. This Court noted that classifications based on population were normally "open-ended and that others may fall under the classification. This is true even if, at the time of suit, only one or a few counties in fact are affected by the legislation." *Id.* at 914-15 (internal citations omitted).

[3] The trial court granted the City's Motion for Summary Judgment on its claim that RSMo. Section 320.097 violated the Missouri Constitution, finding that the residency requirement exemptions provided for in the statute could not be harmonized with the acknowledged constitutional intent to protect charter cities with a broad measure of complete freedom from State legislative control over municipal employment decisions. The State appealed that ruling.

This Court also noted what it had stated in Jefferson County, on the other hand: if the classification was drawn so narrowly that "the only apparent reason for the narrower range is to target particular political subdivision and to exclude all others" even though there are others that theoretically could be similarly situated, then "the law is no longer presumed to be general, but is presumed to be a special law." *Id.* at 914-15 (quoting Jefferson County, 205 S.W.3d at 870).

The City of St. Louis argued that RSMo. Section 320.097 was a special law because only the City of St. Louis both has the residency requirement for its firefighters and has a school district that is not fully accredited. But, this Court stated, within the context of an alleged special law that has non-population, open-ended classifications, that the test for whether a statute is special is not whether another falls within its parameters at a particular time but whether "others may fall into the classification". *Id.* at 915. The Court continued by stating that RSMo. Section 320.097 applies to **any city** with a fire department with employees who have worked for that fire department for seven years and the only public school district in their geographic area of employment has been unaccredited or provisionally accredited in the last five years. This Court reasoned that "[a]ny fire department could adopt a residency requirement, and any school district runs the risk of becoming unaccredited or provisionally accredited." *Id.* at 915. This Court then held based on the statute before it that because "others may fall into the classification," the law was not considered special legislation. *Id.* at 915 (quoting Jefferson County, 205 S.W.3d at 870).

For the purposes of this case, City of St. Louis is distinguishable. First, as opposed to RSMo. Section 320.097, RSMo. Section 322.321.4 does **not**, as admitted to by Respondents, apply to any city; it **only applies** to DeSoto, Missouri. Next, City of St. Louis did not deal with population characteristics, but still relied on Jefferson County. Rather, City of St. Louis dealt with, what Appellants will call "unilateral political decisions". Unilateral political decisions are those types of decisions that a government entity or political subdivision can make using their own discretion and that are within their lawful powers, statutory or otherwise—operating a fire department, having a residency requirement for employees, or keeping a school district accredited. These are by their nature non-population, open-ended classifications.

The crucial characteristic of the RSMo. § 321.322.4 is the population characteristics for both the county and city, for these requirements follow the lifeblood and purpose of any and all legislation—to control the actions and interactions of people or groups of people—and they direct to whom the statute applies. It is the people who form and make up cities and counties. In addition, the other characteristics merely highlight and draw the reader's attention to DeSoto, Missouri.[4] Even if one were to doubt that the county

[4] By way of further explanation, the population and non-population characteristics interact: The population characteristics lay the foundation as to where to locate the city (starting with county size and moving toward city size within that given county), and then using the non-population characteristics to determine if the statute applies to the city—does the

population characteristic is not a focal point of the statute, the city population characteristic is by far the feature characteristic of the statute as the purpose of the RSMo. Section 321.322 is the inter-relation of cities to fire protection districts and *vice versa*.

The proposed test for "hybrid" special legislation

Appellants recognize that RSMo. Section 321.322.4 contains both population and non-population, open-ended characteristics. The non-population characteristics include certain "political decisions", which are not all "unilateral political decisions" for cities, but rather require the actions of other non-related political subdivisions. As such, if this Court is so inclined to analyze RSMo. § 321.322.4 under both Jefferson County and Respondents' view of City of St. Louis, then Appellants propose a new "hybrid" test for the Court's consideration when dealing with a statute that contains both population and non-population, open-ended characteristics:

In regard to population characteristics, those characteristics are by their nature not political decisions whatsoever. As such the population characteristic should be analyzed utilizing the Jefferson County test detailed in full in Appellants' Brief. Because this Court in City of St. Louis recognized the Jefferson County decision when presented with non-population, open-ended characteristics, the non-population, open-ended characteristics should also be analyzed by the three part test in Jefferson County, and then same should be

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county have a charter form of government? Does the City have a fire department? Is the City surrounded completely by a fire protection district? Is the City a third class city?

analyzed by questions that necessarily flow from City of St. Louis: First, what political decisions need to be made or avoided in order for another political subdivision to become or avoid being a political subdivision that will fall within the ambit of the statute? Second, is the particular political subdivision that is subjected to the statute at issue the sole political subdivision that has the necessary legal authority to make any of the political decisions necessary so as to fall or avoid falling within the ambit of the statute at issue in the case? If any one of the characteristics in the legislation is that which does not require a unilateral political decision by the particular political subdivision at issue in the legislation, then the statute should be held as unconstitutional special legislation pursuant to Missouri Constitution, Article III, Section 40 and City of St. Louis. Because Appellants have already detailed their case under Jefferson County, Appellants will now turn to the characteristics in RSMo. § 321.322.4, and analyze all of the characteristics based on the reasoning and holding in City of St. Louis and the test proposed.[5]

Application of the "hybrid" test's City of St. Louis part

City and County Population

Population is not a unilateral political decision or even a political decision whatsoever. Despite Respondents' argument, a city in Missouri cannot do anything on its

[5] Respondents argue that population is a "political decision". Appellants will not only point out the error in the argument, but also analyze population to determine if it is a unilateral political decision.

own to unilaterally increase its population. A city can certainly market itself to others in an attempt to increase its desirability with *perhaps* the goal being to increase the population, although a city doing so may not want more people, but rather an improved overall asset value for tax-revenue purposes. The same reasoning applies to a county. Annexation power alone does not equate to a city having the ability to unilaterally increase its population. Only a large-sized voluntary annexation would yield a substantial increase in the population, but, again, any such argument to this effect would ignore the fact that a voluntary annexation requires the agreement of the citizen and the city—it is inherently not unilateral. Without belaboring the point, an involuntary annexation for a city in Jefferson County, Missouri also requires the involvement of multiple parties—namely the county in which the city sits and the people—so it is not a unilateral political decision. RSMo. Section 71.015.3. Counties cannot annex additional properties, as noted and conceded by Respondents. Therefore, increasing population (or decreasing for that matter) is not a unilateral political decision, much less a political decision at all.

Fire Protection District Boundaries

The formation of a fire protection district and the changing of the jurisdiction or boundaries of a fire protection district may be political decisions, but they are not unilateral political decisions. Both the formation of a new fire protection district and annexation by a fire protection district are not unilateral political decisions—both are subject to circuit court proceedings and vote requirements by citizens in incorporated cities and in unincorporated parts of a county so affected. RSMo. Sections 321.010 (fire district can be

in unincorporated county and city); 321.020 (court petition); 321.090 (court petition can be contested); 321.120 (court order for formation not final until assented to by voters); 321.300.5 (annexation subject to appeal).

Operating a fire department, becoming a third class city, and becoming a charter county

In regard to the other non-population characteristics, Appellants would concede that typically operating a fire department, becoming a third class city, and a county forming a charter government are unilateral political decisions for the particular political subdivision in control of that decision. Again, the focus of this statute is on the city-fire protection district relationship. Therefore, if the county in which a city is incorporated chooses to form a charter government, this is not a unilateral political decision that the city is privy to. So any argument that the formation of a charter government is a unilateral political decision for the purposes of analyzing whether a city may one day fall within the ambit of RSMo. Section 321.322.4 is in error and flawed because the city as a political subdivision has no option or say in the formation of the charter government.

Like-minded[6] v. non-likeminded political subdivisions a necessary distinction

While an argument may be made that the test should be, as presented by Respondents, whether certain political decisions in general can be made to allow for another political subdivision to fall within the classification, such is not the holding or reasoning of City of St. Louis. This Court's reasoning in City of St. Louis simply reflected on whether **any** city could take certain steps to allow for that city to fall within the classification. If this is construed to mean that if any political decision can be made by any political subdivision in existence that will allow another political subdivision to fall within the classification, then such is an error and poor policy indeed. Holding a political subdivision hostage to the political decisions of other political subdivisions undermines the intent and purpose of the Missouri Constitution's and this Court's case law's prohibition on special laws that favor one entity for the sake of another that also demonstrate an inherent intent to favor one entity over another. For example, the City of DeSoto has absolutely no recourse so as to release itself from the grasp of this discriminatory statute, and, if Respondents' argument is followed, other cities in the future will be in a similar quagmire—if a City, such as DeSoto, is being harmed by a statute, then the City is entirely

[6] Like-minded political subdivisions are those that serve the same exact citizens who, although they provide different services, would have in mind the best interests of those identical citizens and the integrity of a common governmental unit.

dependent on the actions of unrelated a non-likeminded political subdivisions. Or, conversely, if a city wants to fall within the ambit of a statute, the City is dependent on non-likeminded political subdivisions. Like-minded political subdivisions are those that serve the same exact citizens who, although they provide different services, would have in mind the best interests of those identical citizens and the integrity of a common governmental unit. (i.e. St. Louis City municipal government and St. Louis City Public School District). However, in this case, City of DeSoto does not have such a benefit of like-minded political subdivisions—in fact, the fire protection district is diametrically opposed to City of DeSoto because they have much to gain from the statute in its current form. (See Respondents' Brief at Page 26: "Many [legislators] represent areas with fire protection districts whose viability is threatened when cities take over territory and tax revenue.") This only highlights the discriminatory, unconstitutional nature of the statute as it favors one entity over another.

In sum, if characteristics stated in legislation are not unilateral political decisions for the type of political subdivision at issue, then the legislation is unconstitutional under this Court's decision in City of St. Louis. Characteristics like forming a charter government, becoming a third class city, operating a fire department, having a residency requirement for employees, or keeping a school district accredited are mutable or changeable characteristics that are arguably "unilateral political decisions" for the respective political subdivisions or even like-minded political subdivisions that have jurisdiction and authority over those decisions. In contrast, population, formation of a

charter government, and the formation or change in the boundary of a fire protection are not unilateral political decisions for the City of DeSoto or any other city, and Appellants assert that population is not a political decision whatsoever. Therefore, RSMo. Section 321.322.4 is unconstitutional because the population classifications and the open-ended, non-population characteristics of the statute render the statute unconstitutional pursuant to Jefferson County and because pursuant to City of St. Louis the open-ended, non-population characteristics of the statute involve unilateral political decisions for other, non-related or non-likeminded political subdivisions.

II. THE PUBLIC POLICY OF THIS STATE IS BEST PRONOUNCED WHEN THIS COURT RECOGNIZES THE DIFFERENCE BETWEEN UNILATERAL POLITICAL DECISIONS WITHIN THE CONTROL OF THE POLITICAL SUBDIVISION AT ISSUE IN THE LEGISLATION AND THOSE CHARACTERISTICS THAT ARE NOT UNILATERAL POLITICAL DECISIONS FOR THE POLITICAL SUBDIVISION AT ISSUE IN THE LEGISLATION OR EVEN POLITICAL DECISIONS AT ALL.

If this Court follows Respondents' argument, then such a holding will result in a disastrous public policy for this state for the following reasons: First, such a holding will effectively nullify Missouri Constitution, Article III, Section 40, subsections 21, 28, and 30. Respondents' implore this Court to adopt a "wait and see" approach that appears to be somewhat akin to an approach that is followed in common law by some states when dealing with the common law trust and estates doctrine of rule against perpetuities: Even when it

is admitted by Respondents that the legislation applies to no other political subdivision, Respondents want this Court to establish a new precedent in the special legislation analysis, whereby this court will, without any specified time limit, allow for a "wait and see" period so as to see if the constitutional deficiency in special legislation can be cured by some other political subdivision falling within the ambit of a statute, someday and hopefully, with the help of other-non-related, non-likeminded political subdivisions. Because this Court can be certain that population classifications are not political decisions, that reason alone is enough to reject Respondents' argument. Respondents, in their brief, have argued that all of the classifications are political decisions. So, under their theory, the Court must wait and see if all of the classifications can be met by some other city and/or some other non-related, non-likeminded political subdivisions before striking down the legislation as unconstitutional. This is an unreasonable and poor public policy indeed.

In contrast to Respondents' quest for a judicial override of the Missouri Constitution, Appellants seek to safeguard the document established by the people of the State of Missouri for the safety of their government and ultimately themselves. Appellants have established herein a test that will allow the State to continue to legislate based on sound and equally applied policy decisions, not lobbyist-driven politics. Appellants' argument recognizes that the State may have an interest in certain areas of the law or matters that require necessary changes to protect legitimate state interests, such as the interest stated in City of St. Louis—allowing children of firefighters to attend accredited

public schools. Appellants' argument maintains this interest and prevents legislation that is meant and has the inherent intent to favor one entity over another.

Second, and somewhat related to the above point, if the legislature is given the power to ignore the Missouri Constitution, at least temporarily (hopefully) during any such "wait and see" period, then certain political subdivisions will be subject to losing their legal autonomy. Even a temporary breach of the Missouri Constitution when dealing with the inter-relation of state government and political subdivisions or the favoring of one entity over another political subdivision, is a serious breach which cannot be tolerated, even temporarily. For it is the temporary breach that leads to the break down, or in the very least the loss of credibility, in our government structure. The best public policy of this state, which this Court should reinforce, is that of upholding and further bolstering the protections and mandates of the Missouri Constitution by refusing Respondents' view and push for new precedent. In contrast, Appellants' argument safeguards the fundamental structure of our state government—providing the legislature a means to address the issues and problems within the state through sound and equally applied policies that do not favor one entity over a political subdivision in this State and protecting against the nullification of the Missouri Constitution.

Finally, if this Court were to hold as Respondents' implore, then the State of Missouri would be effectively taken back to a time prior to our 1875 Constitution, which put into place many of the special legislation protections now embodied in Missouri Constitution, Article III, Section 40. While not perfect, our 1875 Constitution began the

framework for what is now Missouri Constitution, Article III, Section 40, from which we now have the case law framework upon which this case now stands. Prior to 1875, a time when our state was much more agricultural and rural, special legislation was commonplace because, while the common law and some statutes dictated the interactions of Missourians, special legislation was used to provide for roads or funding for specific areas. However, this style of legislating was ripe for being taken advantage of, as it was, thereby resulting in the framework upon which our law now stands today. *See generally* Roscoe E. Harper, "Local and Special Legislation in Missouri under the Constitution of 1875 - Part I - Local and Special Legislation in Missouri Prior to Constitution of 1875", 19 Bulletin Law Series. (1920), available at: http://scholarship.law.missouri.edu/ls/vol19/iss1/3. Respondents, while ironically chiding Appellants for not looking to the future (Respondents' Brief at 25), miss an extremely valuable and necessary role played by Appellants' argument based on the law: Appellants' argument and entire case seeks the preservation of an analytical framework that was forged in 1875 and now lives on in today's Missouri Constitution, Jefferson County decision and City of St. Louis decision. By looking to the past, Appellants' argument and the holding sought by Appellants preserves the future of the government structure of the State of Missouri.

CONCLUSION

WHEREFORE, Appellants have presented a set of material facts as to which there are no genuine dispute, and, based on those undisputed facts, Appellants are entitled to judgment as a matter of law. Appellants have distinguished this Court's case law, and

demonstrated the fallacies in Respondents' arguments and reasoning based on that case law. Appellants pray that the Court, for the reasons stated herein, overrule the trial court's sustaining Respondent's Motion for Summary Judgment and the trial court's denial of Appellants' Motion for Summary Judgment, that R.S.Mo. Section 321.322.4 be held as void and unconstitutional and that Respondents be enjoined from enforcing R.S.Mo. Section 321.322.4.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was served by email, on August 11th, 2015, addressed to:

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06(C)

The undersigned hereby certifies that this Brief complies with the limitations contained in Rule 86.06 (b) and contains 5,226 words, and that any disk filed herewith pursuant to Rule 84.06(g) has been scanned for viruses and is virus free.

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