SC95337

IN THE MISSOURI SUPREME COURT

MISOURI MUNICIPAL LEAGUE,
CITY OF SPRINGFIELD, MO
and RICHARD SHEETS
Appellants

v.

STATE OF MISSOURI
Respondent.

APPELLANTS' REPLY BRIEF

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In 2013 the sponsors of HB 331 and HB 345 —who were no doubt incentivized to do so by the same industry members filing a brief *amicus curiae* in this Court—slipped comprehensive changes into existing bills by unlawful amendments. See LF 28-31 (the circuit court judgment holding that HB 331 and HB 345 were passed contrary to Mo. Const. Art. III §§ 21, 23). Then in 2014, the sponsors drafted SB 649 and SB 650 to disguise those invalid 2013 amendments to make them appear to be valid existing substantive laws to be altered only with minor and very technical amendments.

The State's Brief cites no controlling authority negating the appellants' standing to challenge SB 649 and SB 650, nor does the State's Brief succeed in explaining away how these bills, and the manner in which they were enacted, violate the Missouri Constitution.

I. The acts which SB 649 and SB 650 purported to amend were never law and therefore not capable of being amended. (Addresses the State's POINT I, Appellants' POINT IV).

Once a statute is repealed by subsequent legislation, by operation of a sunset clause, or by a court judgment of invalidity, the only way to bring it back into effect is to re-enact it.

"Since an amendatory act alters, modifies, or adds to a prior statute, all courts hold that a repealed act cannot be amended. "No court will give the attempted amendment effect to revive a repealed act." 1A Sutherland Statutory Construction § 22:3 (7th ed.).

That statement of the law is particularly applicable to Missouri legislation because our Constitution expressly addresses how a law which was passed by the legislature but

later becomes invalid for one reason or the other may be "revived or reenacted." That act must be "set forth at length as if it were an original act" within the bill which re-introduces it. Mo. Const. Art. III § 28. That is a completely different requirement than the one applicable to amending existing law, which is covered by the second clause within § 28.

The State attempts to avoid the constitutional requirement for reviving or reenacting defunct legislation by raising three arguments which only highlight the importance of applying the Constitution as written.

1. The State asserts that the circuit court judgment invalidating HB 331 (2013) and HB 345 (2013) was not a final judgment because appeal was still pending in this Court when SB 649 (2014) and SB 650 (2014) were passed. State's Brief at 3.

Here the State confuses the role of the circuit courts with the role of the Supreme Court in the process of reviewing legislation.

This Court has exclusive appellate jurisdiction in cases involving the validity of a Missouri statute. Mo. Const. Art. V § 3. Original jurisdiction is in the circuit courts. Mo. Const. Art. V § 14(1). A law declared to be invalid is invalid for all purposes and cannot be amended unless and until the decision so declaring is reversed, modified, or stayed. See Appellants' Brief at 34-36.

The State's position in favor of finding that SB 649 and SB 650 were validly enacted depends entirely on ignoring the limited effect which an appeal has on a circuit court judgment declaring an act to be invalid and enjoining its enforcement. That is

exactly what the Cole County circuit court judgment did. LF 32-33 (holding HB 331 and HB 345 to be "invalid, unenforceable, and unconstitutional and of no force and effect in [their] entirety," and making preliminary injunction final (emphasis added)).

Filing notice of appeal opened the 2013 Cole County circuit court judgment to being reversed, modified, or stayed by this Court. None of that ever happened and the State does not claim otherwise.

On the General Assembly's behalf the state asserts than an act which a circuit court declares to have "no force and effect" has "some" force and effect—at least enough that it can be amended. But it is not within the constitutional authority of the General Assembly to pick and choose which court decisions to follow and which sources of the law to credit with validity when legislating.

2. The State contends that because the circuit court judgment was still on appeal, the General Assembly acted constitutionally in "choosing" to disregard that judgment and designate the stricken laws—which were passed the session before and printed in the Revised Statutes—as the law to be amended in SB 649 (2014) and SB 650 (2014). State's Brief at 3-5, 7.

This argument elevates the statute directing the Revisor what to publish to the same station as the constitutional requirement of § 28, which governs, in non-discretionary language, what the General Assembly must do to validly enact legislation.

The purpose of § 28 is to protect the citizens against the very slight-of-hand which the sponsorship of these bills orchestrated two sessions in a row. Nothing within § 28

speaks to the Revised Statutes. It addresses how a defunct "act" must be "revived or reenacted," or how an existing "act" must be "amended."

Whatever the statute books may contain does not change the fact that the 2013 acts were not valid laws and therefore not subject to being amended when SB 649 and SB 650 were introduced, passed, and signed into law.

3. The State contends that so long as the law is set forth in the subsequent bills in its entirety, "that is all that the Constitution requires." State's Brief at 5-6.

Amending existing law—not reviving or reenacting stricken legislation—is the subject of the State's leading authority, *C.C. Dillon Co. v. City of Eureka*, 12 S.W.3d 322 (Mo. banc 2000). See State's Brief at 5. If SB 649 and SB 650 were only amending valid acts passed the session before in HB 331 and HB 345, the State would be correct in saying that the General Assembly met *C. C. Dillon*'s requirement that "the sections as amended be set out in full." State's Brief at 5-6.

But that misses the point because the State's quoted language from *C. C. Dillon* is not applicable to what the legislature did in 2014. The legislative sponsors and even legislative staff presented SB 649 and SB 650 as minor amendments to statutes governing public right-of-way and cell towers. See LF 207 (bill summary for SB 650 (2014), showing three words added to a venue clause in the law as it would have been had HB 331 (2013) remained in effect).

In reality the legislature tried in 2014 to "revise or reenact" the sweeping changes to these statutory schemes invalidly attempted in 2013 by HB 331 and HB 345.

The public is entitled to nothing less than having its statutes transparently passed (at least once).

II. This Court has never overruled or limited the controlling case which holds that a Missouri city has standing to assert a retrospective law challenge, under Mo. Const. Art. I § 13, to legislation impacting city right-of-way. (Briefed in Appellants' POINT I, Respondent's POINT II).

The State acknowledges that in *Planned Industrial Expansion Authority v. Southwestern Bell Telephone Co.*, 612 S.W.2d 772 (Mo. 1981), this Court upheld a city's retrospective law challenge under Mo. Const. Art. I § 13 to legislation granting utility companies' vested rights in city right-of-way. State's Brief at 12.

However, the State asserts that Springfield and MML lack standing to assert a retrospective law challenge based on *Savannah R-III School District v. Public School Retirement System of Missouri*, 950 S.W.2d 854 (Mo. 1997). State's Brief at 10-12. That case holds that Missouri public school districts lack standing to challenge legislation governing teacher retirement contributions.

In an attempt to persuade the Court to apply *Savannah R-III* and disregard *Planned Industrial*, the State contends—incorrectly—that the issue of standing was not raised or determined in *Planned Industrial.* State's Brief at 12 ("the broader challenge to standing made in *Savannah R-III* was never made, and certainly not decided [in *Planned Industrial*]."). Not so. The *Planned Industrial* Court found city standing to raise a retrospective law challenge to a Missouri statute. *Planned Industrial*, 612 S.W.2d at 776

("the City is declared to be a 'person' by Rule 87.05 and it properly may seek a declaration as to [constitutionality of the statute]").

The appellants' circuit court petition seeks declaratory judgment and is styled as a "Verified Petition for Declaratory Judgment, Injunction, and Other Relief." LF 8 (emphasis added).

Savannah R-III makes no mention of *Planned Industrial* and decides no issue involving public right-of-way owned by a Missouri city. Hence the State invites the conclusion—without venturing so far as to say it directly—that the Court *sub silentio* overruled *Planned Industrial* in *Savanna R-III*. State's Brief at 12.

Savannah R-III has zero precedential value in deciding the case at bar. That is because…

> …[t]his Court's presumption against *sub silentio* holdings…is based not only on the general preference that precedent be adhered to and decisions be expressly overruled, but also because the implicit nature of a *sub silentio* holding has no *stare decisis* effect and is not binding on future decisions of this Court.

State v. Honeycutt, 421 S.W.3d 410, 422 (Mo. banc 2013)(underscoring for emphasis added).

Savannah R-III should be limited to the issue decided. Justice Robertson attempted to do just that in his dissent. See *Savannah R-III*, 950 S.W.2d at 861("there is no logical firewall that prohibits the majority's holding [limiting school district standing] from extending to cities and counties.").

The issue before the Court in the present appeal is controlled by *Planned Industrial*, not *Savannah R-III.*

III. Springfield and the MML validly pleaded a special law challenge. (Responding to the State's POINT III, Appellants' POINT II).

Springfield and the MML have adequately pleaded for a declaration that SB 649 violates Mo. Const. Art. III § 40(28) by granting special privileges to public utilities which "ha[ve] legally been granted access to the political subdivision's right-of-way." LF 18. As explained in Appellants' Brief…

> …[t]hat class of public utilities is closed because it is limited to those having historic and legally granted permission…[a]ll other public utilities are subject to municipal permitting requirements and may be required to enter into contracts setting out terms and conditions of access.

Appellants' Brief at 26. This is so that regardless of whether the law includes a date closing class membership, because those public utilities that "have" access are treated differently. The word "have" is temporal in meaning and establishes a class in existence. Users that do not "have" right-of-way access at the time of passage are not protected and their rights are not enshrined.

Thus, the petition more than adequately alleges a violation of §40(28) under the pleading standards identified in the State's Brief at 13-15.

IV. The Court need not address the "special law" issue raised in Appellants' POINT II if it determines that Springfield and MML have standing to assert the "retrospective law" challenge stated in Appellants' POINT I and rules that the 2014 legislation violates the prohibition against "retrospective laws." (Responding to the State's POINT III, Appellants' POINT II).

This is an issue the Court need not reach because this special law challenge applies to the same legislation challenged on retrospective law grounds in Appellants' Brief at POINT I. Granting the latter renders addressing the former unnecessary. The State does not assert that there is any deficiency in Springfield's and MML's pleading on their retrospective law claims. The same basis for finding standing to raise a retrospective law challenge applies to Springfield's and MML's challenge to the law as a special law. *Planned Industrial,* 612 S.W.2d at 777.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served electronically upon respondent on this 5th day of April, 2016, to James R. Layton, Solicitor General, Office of the Attorney General, Supreme Court Building, P.O. Box 899, Jefferson City, Missouri 65102-0899; james.layton@ago.mo.gov.

/s/ Michael G. Berry
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with Rule 84.06(b) and contains 1,927 words and 162 lines, excluding the cover, certificate of service, certificate of compliance, signature block and appendix; and that the brief contains words in 13 point Times New Roman.

/s/ Michael G. Berry
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