SC95337

IN THE SUPREME COURT OF MISSOURI

MISSOURI MUNICIPAL LEAGUE, CITY OF SPRINGFIELD, MISSOURI and RICHARD SHEETS,

Appellants,

v.

STATE OF MISSOURI,

Respondent.

Appeal from the Circuit Court of Cole County, Missouri
The Honorable Jon E. Beetem, Circuit Judge

BRIEF OF RESPONDENT

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STATEMENT OF FACTS

This is a challenge to all (on procedural grounds) and parts (on other grounds) of two bills passed by the General Assembly in 2014, S.B. 649 and S.B. 650. S.B. 649 is included in Appellant's Appendix beginning at (Appellant's Appendix "App.") App. A27. S.B. 650 is at App. A59.

These bills replaced two bills enacted by the General Assembly in 2013: H.B. 331 (App. A34) and H.B. 345 (App. A70). The Circuit Court for Cole County held that those two bills were enacted contrary to the procedural requirements of Article III of the Missouri Constitution. Judgment and Order (October 17, 2013), *City of Liberty v. State of Missouri*, No. 13AC-CC00505 (Cole County). App. A20–A26. The State appealed that judgment to this Court in No. SC93799.

This Court dismissed the appeal on August 28, 2014. The two 2014 bills had been signed by the governor more than five months earlier. They became effective on August 28, 2014. *See* Mo. Cont. Art. III, § 29.

Two days before the bills became effective, Plaintiffs—the City of Springfield, the Missouri Municipal League, and Richard Sheets—brought this suit challenging the validity of both S.B. 649 and S.B. 650. App. A1–A69. On June 30, 2015, the circuit court granted the State's motion for judgment on the pleadings in part and to dismiss in part. App. A74–A84.

ARGUMENT

I. The method of enactment of S.B. 649 and S.B. 650 met the constitutional requirements by fully stating what the laws, as amended, would say. (Responds to Appellants' Point IV).

Though Plaintiffs put their legislative procedure argument near the end of their brief, we start there—because if Plaintiffs were right, their substantive arguments would be moot, and addressing Plaintiffs' standing to make them would be unnecessary. But Plaintiffs are not right: In enacting S.B. 649 and S.B. 650, the legislature did not "clearly contravene a constitutional provision." *State v. Robinson*, No. SC94936, 2016 WL 502833, at *2 (Mo. Feb. 9, 2016).

Plaintiffs claim that the enactment violated Art. III, § 28, a provision designed to make it possible for a person reading a bill to see what the law, as amended, would say:

> No act shall be revived or reenacted unless it shall be set forth at length as if it were an original act. No act shall be amended by providing that words be stricken out or inserted, but the words to be stricken out, or the words to be inserted, or the words to be stricken out and those inserted in lieu thereof, together with

> the act or section amended, shall be set forth in full as amended.

There is no dispute that both S.B. 649 and S.B. 650 "set forth at length" what the law would say if they were enacted, "as if [they] were … original act[s]." The problem, Plaintiffs believe, comes with regard to which words were printed as being "stricken out." And the problem arose because of the unusual situation at the time S.B. 649 and S.B. 650 were introduced, passed, and signed.

The bills showed as "words stricken out" those enacted in 2013, which the Cole County Circuit Court had held in October 2013, in *City of Liberty* were unconstitutionally enacted. Because the State appealed, that decision was not final when the 2014 legislature convened. In fact, it did not become final until this Court dismissed the State's appeal (No. SC93799) on August 28, 2014—months after the new language in S.B. 649 and S.B. 650 was enacted, and the day these new bills became law.

When these bills were introduced, when they were passed in each house, when they were signed by the governor, and even when they became effective, if someone was looking at the current Missouri code for comparison, the code would show the 2013 versions. That was not because of some discretionary decision by the Revisor. It was the result of statute. Because until August 2014 there was not a final judgment declaring the 2013 bills

unconstitutional, the Revisor of Statutes was required by § 3.066 to print the version challenged in *City of Liberty*:

> *When the Missouri supreme court* or a federal court with competent jurisdiction *makes a final ruling* that a bill enacted by the Missouri general assembly or a Missouri state statute or any portion of a Missouri state statute contained in a bill enacted by the Missouri general assembly is unconstitutional on procedural grounds, the Missouri revisor of statutes shall:
>
> (1) For a repealed statute or an amended statute contained in such bill, reprint the statute as it existed in the revised statutes of Missouri prior to the enactment of the bill that the court declared unconstitutional;
>
> (2) For a new statute contained in such bill, remove the new statute from the revised statutes of Missouri, if necessary, and publish only a footnote calling attention to the ruling of the court explaining the reason for the removal of such statute from the revised statutes of Missouri.

§ 3.066 (emphasis added). That approach makes sense. It minimizes changes in the Code, and ensures that somewhere in the Code both versions appear: the old version in one year, and the new one in the next—and are thus readily available to lawyers and laypersons alike.

Section 3.066 does not, of course, tell the General Assembly to follow that pattern when determining which language to quote as "stricken out." But it makes sense for the legislature to follow the pattern it has instructed the Revisor of Statutes to follow—and thus to avoid or minimize producing bills that are inconsistent, without explanation, with the latest published version of the Code.

What Plaintiffs demand, instead, is that the General Assembly have printed the bills so that they would not match the Revisor's publications. That approach serves no purpose that can be divined from Art. III, § 28. Indeed, it seems contrary to the purpose of that section, which this Court has said is "'to have in a section as amended a complete section so that no further search will be required to determine the provisions of such section as amended.'" *C.C. Dillon Co. v. City of Eureka*, 12 S.W.3d 322, 327 (Mo. 2000) quoting *Flanders v. Morris*, 88 Wash.2d 183, 558 P.2d 769, 773 (1977). Thus this Court long ago observed that under what was then Art. IV, § 34, "when a section of an existing statute is amended, the sections as amended must be

set out in full; *nothing more is required*." *Morrison v. St. Louis, I. M. & S. Ry. Co.*, 96 Mo. 602, 9 S.W. 626, 628 (Mo. 1888) (emphasis added).

This Court's statement in *C.C. Dillon* is consistent with a key phrase in the clause on which Plaintiffs rely, "set forth in full as amended." Plaintiffs have never explained why the language preceding that phrase is or should be mandatory rather than directory. They do not consider the confusion that would be caused if the General Assembly based its "insertions and deletions" on language that had already been replaced in the Revised Statutes per § 3.066. And they do not identify anything in the Constitution itself that tells the General Assembly that the "words to be stricken out" should not include recently enacted language when that language has been challenged but the challenge is still being litigated.

We do not suggest that the constitutional requirement is entirely free from ambiguity in this unusual—though not likely unique—situation. But even when it reinvigorated judicial review of legislative procedures mandated by the Constitution, this Court declared that it will resolve doubts in favor of the legislature. *Hammerschmidt v. Boone Cnty.*, 877 S.W.2d 98, 102 (Mo. 1994). To do so recognizes not just the popular will manifest in the legislature, but the constitution's assignment to that branch of legislative power. *See* Art. III, § 1. *See also State v. Robinson*, No. SC94936, 2016 WL 502833, at *2 (Mo. Feb. 9, 2016) ("Statutes are presumed constitutional and

will be found unconstitutional only if they clearly contravene a constitutional provision."

Thus the question here is whether by choosing to use for the language printed as being "stricken out" the words that had been passed, signed by the governor, and published by the Revisor, prior to a final judicial determination that the 2013 language was invalid, the General Assembly "clearly contravened" Art. III, § 28. Perhaps a circuit court declaration that a particular bill was unconstitutionally enacted, though before the appellate courts, would have been enough to justify the General Assembly quoting language from the pre-2013 rather than the 2013 version of the law. But the General Assembly did not, by choosing otherwise, "clearly contravene" the constitutional mandate.

II. The City of Springfield, as a political subdivision, and the Missouri Municipal League, as an association of political subdivisions,[1] lack standing to invoke the "retrospective law" clause of Art. I, § 13. (Responds to Appellants' Point I and in part to Point III.)

Plaintiffs' claim that portions of the bills being attacked were unconstitutionally retrospective (Point III) raises the question of standing. Of course, a *person* directly affected by such laws has standing to challenge them, invoking his or her rights in Missouri's Bill of Rights—Article I of our constitution. But that does not mean that political subdivisions such as cities have the same rights—and they do not.

That is the lesson taught, specifically with regard to retrospective law claims, in *Savannah R-III Sch. Dist. v. Pub. Sch. Ret. Sys. of Mo.,* 950 S.W.2d 854, 858 (Mo. 1997). There, this Court distinguished between citizens, who

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[1] In their Point III, Plaintiffs claim that the circuit court erred in dismissing some claims of the Missouri Municipal League because the League has "associational standing." But, the circuit court did not rule whether the League has standing, because its conclusion that the City of Springfield lacked standing as to those claims would apply equally to each of the cities that comprises the League.

Article I was enacted to protect, and political subdivisions of the state, which exist only by authority of the General Assembly. The Court held that school districts, as creations of the State, have no right to invoke the retrospective law clause:

> Because the retrospective law prohibition was intended to protect citizens and not the state, the legislature may constitutionally pass retrospective laws that waive the rights of the state. … All of the representative plaintiffs are school districts. "School districts are bodies corporate, instrumentalities of the state established by statute to facilitate effectual discharge of the General Assembly's constitutional mandate to establish and maintain free public schools...." … As "creatures of the legislature," the rights and responsibilities of school districts are created and governed by the legislature. … Hence, the legislature may waive or impair the vested rights of school districts without violating the retrospective law prohibition. …

950 S.W.2d at 858 (citations omitted.)

Like school districts, "[m]unicipalities are creatures of the legislature." *Damon v. City of Kansas City*, 419 S.W.3d 162, 183 (Mo. App. W.D. 2013), citing *Anderson v. City of Olivette*, 518 S.W.2d 34, 39 (Mo. Div. I, 1975). Cities are "municipal corporations"—and thus, like school districts, a form of "bodies corporate" under state control. *See, e.g., St. Louis Hous. Auth. v. City of St. Louis*, 361 Mo. 1170, 1177-78, 239 S.W.2d 289, 294 (Mo. banc 1951) ("By both judicial recognition and common usage 'municipality' is a modern synonym of 'municipal corporation'. 'Municipality' is all embracing. It includes, of course, cities of all classes …."); *State ex rel. Chouteau v. Leffingwell*, 54 Mo. 458, 472 (1873); § 79.010, RSMo. And cities—again, like school districts—are "instrumentalities of the State." *Marshall v. Kansas City*, 355 S.W.2d 877, 883 (Mo. 1962) (A city is "an instrumentality of the state established for the convenient administration of local government.").

The holding in *Savannah R-III* with regard to retrospective laws was not novel. Rather, it followed from the Court's conclusion that political subdivisions cannot claim the due process rights promised to citizens in Article I: "Generally speaking, political subdivisions, such as school districts, lack such standing because they are not considered 'persons' having a constitutional right to due process or equal protection of the law." *Comm. for Educ. Equal. v. State*, 878 S.W.2d 446, 450 (Mo. 1994). The City of Springfield is not a "person" who has the constitutional rights that we

possess as citizens pursuant to Article I—neither the right to due process, nor the right to be free from retrospective laws.

That conclusion is the logical result of the constitutional decree that cities exist *only* as authorized by the legislature. The Constitution assigns to the General Assembly authority to "provide by general laws for *the organization* and classification of cities and towns." Art. VI, § 15 (emphasis added). There is no constitutional right for persons to form a city, only a statutory one.

That the Constitution promises that a city, once organized as permitted by the General Assembly, may elect to become a charter city pursuant to Art. VI, § 19, does not impart to such city Article I rights. The city still exists only as a creature of legislation, by the grace of the General Assembly, and possess only those rights it was given by statute—or, for charter cities, by Art. VI, § 19 itself, which does not purport to incorporate the right against retrospective laws nor other rights in Article I. Thus the City of Springfield—and the Missouri Municipal League, as a group of cities—lacks standing to challenge a statute as "retrospective."

To avoid the result in *Savannah R-III*, Plaintiffs cite *Planned Indus. Expansion Auth. v. Southwestern Bell Tel. Co.*, 612 S.W.2d 772 (Mo. 1981). According to Plaintiffs, there this "Court found that the City of St. Louis had standing to assert its challenge to the amendment by seeking a declaratory

judgment, *id.* at 776." App. Br. at 20. The Court's opinion, however, is not broad enough to cover the point reached by the circuit court here.

The question discussed at the referenced page in *Planned Industrial* was whether "the City's rights in the streets and alleys within its borders [were] impacted adversely" by the challenged statute. 612 S.W.2d at 776. The Court found that they were. But if that were enough to give a political subdivision standing, the Savannah R-III School District would have also had standing—which this Court held it did not. The narrow finding by this Court in 1981, in a case where it appears that the broader challenge to standing made in *Savannah R-III* was never made, and certainly was not decided, cannot be a basis for taking a route that conflicts with *Savannah R-III*.

III. Plaintiffs did not—and could not—state a claim that § 67.1842.1(6) is a "special law." (Responds to Appellants' Point II and in part to Point III.)

That political subdivisions cannot, absent legislative authorization, claim the same constitutional rights as individual citizens is a rule that should apply to each of the rights promised in Article I, the Bill of Rights of the Missouri Constitution. The circuit court also extended that limitation to a portion of Article III, the legislative article: the limitation on "special laws."

Before deciding *Savannah R-III*, and perhaps inconsistent with this Court's later limitations on the ability of political subdivisions to sue on constitutional grounds, this Court allowed some political subdivisions to assert some "special law" claims. *Ryder v. St. Charles Cnty.*, 552 S.W.2d 705, 708 (Mo. 1977); *W.R. Grace & Co. v. Hughlett*, 729 S.W.2d 203, 206 (Mo. 1987). The Court has also allowed such a claim after *Savannah R-III*, in *City of Springfield v. Sprint Spectrum, L.P.*, 203 S.W.3d 177 (Mo. 2006) – though without considering the impact or rationale of *Savannah R-III*. Missing from Appellant's Brief is any rationale for declining to extend the *Savannah R-III* approach to "special law" claims.

But this Court need not tackle that question here because Plaintiffs did not state a claim, in their Petition, that any portion of the challenged bills violated the "special law" limitation in Article III. Nor could they.

The limitation Plaintiffs invoke is Art. III, § 40(28), which bars enactment of a "special law" "granting to any corporation, association or individual any special or exclusive right, privilege or immunity." This Court has recently reiterated the test for defining something as a "special law":

> This Court has defined special laws as those that "include[ ] less than all who are similarly situated ..., but a law is not special if it applies to all of a given class alike and the classification is made on a

> reasonable basis." … This test for whether a law is a special law is similar to the test for determining whether a law violates the equal protection clause: if a classification is made on a reasonable basis or applies to all in a given class, then it is not an improper special law.

Ambers-Phillips v. SSM DePaul Health Ctr., 459 S.W.3d 901, 913 (Mo. 2015), quoting *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 831 (Mo. 1991).

To state a "special law" claim, then, Plaintiffs were required to assert—and plead facts that would show, *see ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 379 (Mo. 1993) ("Missouri is not a 'notice pleading' state.)—that the challenged statute does not "apply to all of a given class alike."

In their Petition, these Plaintiffs did not do so. In fact, they said nothing about any "given class." Plaintiffs merely quoted the pertinent constitutional provision (Petition, App. A7, ¶ 28), then included a request for a declaration (Petition, App. A11, Prayer ¶ 1) that "Section 67.1842.1(6) as enacted by S.B. 649 [is] an unconstitutional special law that grants special privileges and benefits to [some] public utilities." Having failed to identify any class that was divided by the statute, Plaintiffs did not state a "special law" claim.

In their brief to this Court, Plaintiffs attempt to fill in the blank. But that attempt fails—not only because it is too late, but because it misreads the statute.

To fill in the blank, Plaintiffs refer to § 67.1842.1(6) as enacted in S.B. 649. App. Br. at 26. Then, as to the "given class," they claim that the subsection applies not to all utilities, but "only to those public utilities which had lawful access [to city right-of-way] at the time of enactment" of S.B. 649. *Id*. That is not what § 67.1842.1(6) says.

According to § 67.1842.1, "[i]n managing the public right-of-way and in imposing fees pursuant to sections 67.1830 to 67.1846, no political subdivision shall: … (6) Require any public utility that has legally been granted access to the political subdivision's right-of-way to enter into an agreement or obtain a permit for general access to or the right to remain in the right-of-way of the political subdivision." Plaintiffs argue that it applies to a "closed class." But in describing the section, they use words that neither appear in nor are supported by the statute:

> That class of utilities is closed because it is limited to those having *historic* and legally granted permission to use local government right of way *at the time of enactment*.

App. Br. at 26 (emphasis added). Plaintiffs are right that the provision applies only to those who have been "legally granted permission to use" a city's right of way. But the word "historic" is Plaintiffs' insertion; the word does not appear in the provision being attacked. And the provision contains no limitation to permission that had been granted "at the time of enactment."

Plaintiffs' description of § 67.1842.1 might have been accurate had the circuit court in *City of Liberty* not stricken H.B. 331 (2013) and had the legislature not replaced it in S.B. 649 (2014). As shown by the bracketed language in S.B. 649, the new bill deleted a limiting date—a date that matched the effective date of the 2013 bill:

> Require any public utility that has legally been granted access to the political subdivision's right-of-way *[prior to August 28, 2001],* to enter into an agreement or obtain a permit for general access to or the right to remain in the right-of-way of the political subdivision.

S.B. 649, App. A33 (emphasis added). *See* H.B. 331, App. A40. By omitting the bracketed words, the General Assembly applies the new language to every "public utility" once it "has been granted access" to the city's right of way. That is not a "closed class," and its definition cannot violate the "special law" limitation of Art. III, § 40(28).

IV. Plaintiffs failed to state a claim under Art. X, § 23, the "unfunded mandate" provision of the Hancock Amendment. (Responds to Appellants' Point V.)

Finally, Plaintiffs claim that the challenged bills impose "unfunded mandates" without the appropriations required by the Hancock Amendment, Art. X, § 21. But political subdivisions like cities lack standing to assert such claims. *King-Willmann v. Webster Groves Sch. Dist.*, 361 S.W.3d 414, 416 (Mo. 2012). So the Hancock Amendment claim could not be asserted by the City of Springfield, nor by the Missouri Municipal League, whose standing is derivative of its city members. It could only be asserted by the individual plaintiff, Richard Sheets, as Plaintiffs implicitly concede. App. Br. at 44-45.

But plaintiff Sheets did not state a claim, and judgment on the pleadings was appropriate.

Sheets asserted that he is "a resident of Cole County, State of Missouri and a taxpayer." Petition ¶ 3, App. A2. But nowhere in the Petition did he assert that either statute imposed an unfunded mandate on Cole County.

Sheets' first attempted Hancock Amendment claim was stated in paragraphs 37 and 38 of the Petition. Paragraph 37 stated the pertinent law. App. A9, 16. Paragraph 38 then attempted to state a claim—but did so only with regard to cities:

> 38. SB 649 violates Article X, Section 21, of the Missouri Constitution in that it … imposes a new unfunded mandate *on the cities* by requiring them to incur attorneys' fees and costs in connection with right-of-way permits, applications, or agreements ….

App. A9 (emphasis added). "The cities" were not defined in the Petition. But what matters here is that Plaintiff Sheets did not allege that he resided in or was a taxpayer of any city. Being a county resident and a county taxpayer does not give him standing to sue to benefit taxpayers of Springfield or any other city.

Sheets' second Hancock Amendment claim fails for the same reason. Again, he alleged that the General Assembly imposed "a new unfunded mandatory activity on the Cities." Petition, App. A14, ¶ 52(b). He alleged that "Municipalities including the City of Springfield will incur more than *de minimis* increase in costs as a result of these new unfunded mandates." Petition, App. A14, ¶ 52(c). And he alleged that "MML's members … will incur more than *de minimis* increased costs." Petition, App. A15, ¶ 53. But Sheets is not a resident or taxpayer of the City of Springfield. Nor, so far as we know from the Petition, is he a resident or taxpayer of any municipality that belongs to the Missouri Municipal League.

Plaintiff Sheets seems to argue that being a taxpayer of the political subdivision that will incur "more than *de minimis* cost" is unnecessary—*i.e.*, that taxpayer standing under Art. X, § 23, is so broad that a taxpayer in one jurisdiction can sue to excuse some other, perhaps distant, political subdivision from complying with the General Assembly's mandate.

This Court has repeatedly observed, "Standing requires that a party have a personal stake arising from a threatened or actual injury." *State ex rel. Williams v. Mauer*, 722 S.W.2d 296, 298 (Mo. 1986), quoted with approval, *Schweich v. Nixon*, 408 S.W.3d 769, 774 (Mo. 2013). Nothing in the language or history of the Hancock Amendment suggests that the voters intended to *entirely* abrogate that requirement. It assures standing for "any taxpayer of *the* … county, or other political subdivision" (Art.X, § 23 (emphasis added)), not for any taxpayer of *any* county or political subdivision.

The only case Plaintiff Sheets cites is *Fort Zumwalt Sch. Dist. v. State*, 896 S.W.2d 918, 919 (Mo. 1995). But there the individual plaintiffs were "residents and taxpayers of *the*[] school districts" on which the mandate was allegedly imposed. (Emphasis added.) The same direct connection was at least alleged, so far as we know, in every reported case in which an "unfunded mandate" claim has been made.

This Court should expressly reject the idea that Art. III, § 23 gives taxpayers in one political subdivision standing to sue to excuse another

political subdivision from complying with an "unfunded mandate." And it should affirm the circuit court's decision because plaintiff Sheets did not allege facts sufficient to show that he had "a personal stake" in the outcome, *i.e.*, he did not allege that S.B. 649 imposed an "unfunded mandate" on "the" political subdivision in which he lives.

CONCLUSION

For the foregoing reasons, the trial court's judgment upholding the constitutionality of S.B. 649 and S.B. 650 should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of the foregoing was served electronically via Missouri CaseNet on the 14th day of March, 2016, to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 4,750 words.

/s/ *James R. Layton*
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