IN THE MISSOURI SUPREME COURT

Appeal No. SC 91228

St. Louis County, Missouri, *et al.*,

Appellants,

vs.

Prestige Travel, Inc., *et al.*,

Respondents.

Appellants' Brief

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JURISDICTIONAL STATEMENT

The Missouri Supreme Court has exclusive jurisdiction of this appeal under Article V, Section 3 of the Missouri Constitution as the appeal involves both the construction of the revenue laws of this state and the validity of a statute of this state.

This appeal involves construction of Sections 67.619 and 67.657, RSMo. (2009). This appeal presents an issue of first impression as to whether these statutes, as they existed at the time the underlying lawsuit was filed, required an internet travel company to remit taxes on the full amount paid by its customer for a hotel or motel room (hereinafter, "room" or "sleeping room") regardless of how much money was remitted by the internet travel company to the operator of the hotel for that room.

This bill also concerns the validity of House Bill 1442 (95th General Assembly 2010), codified at Section 67.662, RSMo., which purports to "clarify" the meaning of the above-cited sections so as to require that such taxes be based on the amount received by the operator of the hotel regardless of the amount of money paid by the internet travel company's customer.

STATUTES AT ISSUE

This appeal primarily concerns the three statutes mentioned in the Jurisdictional Statement.

Section 67.619.1, RSMo. (2009) states in relevant part:

> The commission … may submit to the voters of such city and such county a tax … on the amount of sales or charges for all sleeping rooms paid by the transient guests of hotels and motels situated within the city and county involved, and doing business within such city and county.…

Section 67.657.4, RSMo. (2009) states in relevant part:

> In addition to any other tax imposed by law … the governing body of the county may submit to the voters of the county a tax … on the amount of sales or charges for all sleeping rooms paid by the transient guests of hotels and motels situated within the county involved, and doing business within such county…

Section 1 of House Bill 1442 (95th General Assembly 2010), codified at Section 67.662, states in relevant part:

> Section 1. Notwithstanding any other provisions of law to the contrary, any tax imposed or collected by any municipality, any county, or any local taxing entity on or related to any transient accommodations, whether imposed as a hotel tax, occupancy tax, or otherwise, shall apply solely to amounts actually received by the operator of a hotel, motel, tavern, inn, tourist cabin, tourist camp, or other place in which rooms are furnished to the public. Under no circumstances shall a travel agent or intermediary be deemed an operator of a hotel, motel, tavern, inn, tourist cabin, tourist camp, or other place in which rooms are furnished to the public unless such travel agent or intermediary actually operates such a facility. This section shall not apply if the purchaser of such rooms is an

> entity which is exempt from payment of such tax. This section is intended to clarify that taxes imposed as a hotel tax, occupancy tax, or otherwise, shall apply solely to amounts received by operators, as enacted in the statutes authorizing such taxes.

STATEMENT OF FACTS

Appellants St. Louis County (the "County") and St. Louis Convention and Visitors Commission (the "CVC" or the "Commission") were plaintiffs below. [LF 11].

As authorized by Sections 67.619 and 67.657, the County and the CVC submitted propositions to the voters seeking authorization to charge taxes on hotel and motel rooms. Both propositions were approved and the County issued ordinances to effectuate the taxes. [LF 14-16].

The specifics of the ordinances do not appear relevant to the appeal.[1]

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[1] The County's ordinances for the levy and collection of taxes are collected in Chapter 502 of the County Code. A copy of the County Code is available on the internet at http://library3.municode.com/default-test/DocView/11512/1/33/35.

The appellees (the "Resellers") are some 20 companies engaged in the business of selling or reselling rooms in St. Louis County and the City of St. Louis over the internet and through other means of interstate commerce. [LF 11-14].

As alleged in the petition, each of the Resellers contracts with hotel and motel operators (hereinafter, "operators") for rooms at a negotiated, discounted room rate (the "Discount Price"), and then sells or resells the rooms to transient guests at a higher price ("Marked Up Price"). Whenever a Reseller sells or resells a room to a transient guest, the Reseller remits the Discount Price to the operator and keeps the balance of the Marked Up Price. [LF 17].

When selling or reselling a room, some Resellers do not collect room taxes from their customers, the transient guests. Other Resellers may collect room taxes from transient guests based upon the Discount Price the Reseller pays the operator. It is not known whether any of the Resellers collected room taxes from transient guests based upon the Marked Up Price that the guests pay for the rooms. [LF 17-18].

It is the County's and CVC's contention that Resellers (or whoever pays room taxes) are obliged under Sections 67.619 and 67.657 to pay room taxes based on the actual price transient guests pay for their rooms — the Marked Up Price — and not the lesser Discount Price amount that the Resellers pay the operators for the rooms. [LF 14-23].

Resellers disagree. Resellers moved to dismiss on the ground that only those who operate a hotel or motel within St. Louis are required to collect and remit room taxes, and that therefore Resellers were not required to do so. [LF 26-27, 32]. Resellers also contended that room taxes did not apply to amounts paid by transient guests in excess of the Discount Price paid by Resellers to operators because the balance of the Marked Up Price was not a room charge but was instead Resellers' compensation for providing internet reservation services to transient guests. [LF 35-36].

The Circuit Court denied Resellers' motion to dismiss. [LF 100].

After the petition was filed, however, and while the case was pending, the General Assembly enacted House Bill 1442. Once that bill was signed into law by the Governor July 8, 2010, Resellers filed a notice of supplementary authority and a motion for reconsideration. [LF 101-07].

The Circuit Court granted Resellers' motion for reconsideration and, in reliance upon House Bill 1442, entered an order dismissing the petition with prejudice. This order was entered September 8, 2010. [LF 155]. Judgment in favor of Resellers was entered September 27, 2010. [LF 156].

The County and the CVC timely filed their notice of appeal September 30, 2010, less than 30 days after entry of both the order and the judgment. [LF 157].

POINTS RELIED ON

I.

The Circuit Court erred in dismissing the petition in reliance upon House Bill 1442 because the bill is unconstitutional in violation of Article III, Section 39(5) of the Missouri Constitution and unenforceable in that the bill attempts to extinguish without consideration the indebtedness, liability, and obligation of Resellers for accrued room taxes.

Article III, Section 39(5) of the Missouri Constitution

Mid-America Television Co. v. State Tax Comm'n, 652 S.W.2d 674, (Mo. banc 1983)

Missouri Coalition for the Environment v. Joint Committee on Administrative Rules, 948 S.W.2d 125 (Mo. banc 1997)

State ex rel. Pollock v. Becker, 233 S.W. 641 (Mo. banc 1921)

II.

The Circuit Court erred in dismissing the petition in reliance upon House Bill 1442 because the bill is unconstitutional in violation of Article III, Sections 21 and 23 of the Missouri Constitution and unenforceable in that the bill contains more than one subject, not all of which are clearly expressed in its title, and was amended in its passage so as to change its original purpose.

Article III, Section 21 of the Missouri Constitution

Article III, Section 23 of the Missouri Constitution

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

Homebuilders Assoc. of Greater St. Louis v. State, 75 S.W.3d 267, 270 (Mo. banc 2002)

Missouri Association of Club Executives v. State, 208 S.W.3d 885 (Mo. banc 2006)

Rizzo v. State, 189 S.W.3d 576 (Mo. banc 2006)

ARGUMENT

I. The Circuit Court erred in dismissing the petition in reliance upon House Bill 1442 because the bill is unconstitutional in violation of Article III, Section 39(5) of the Missouri Constitution and unenforceable in that the bill attempts to extinguish without consideration the indebtedness, liability, and obligation of Resellers for accrued room taxes.

While all statutes are presumed to be constitutional, a statute that "clearly and undoubtedly violates some constitutional provision" and "palpably affronts fundamental law embodied in the constitution" should be invalidated. *Ehlmann v. Nixon*, 323 S.W.3d 787, 788 (Mo. banc 2010).

Article III, Section 39(5) of the Missouri Constitution states:

> Section 39. Limitation of power of general assembly. — The general assembly shall not have power:
>
> …
>
> (5) To release or extinguish or to authorize the releasing or extinguishing, in whole or in part, without consideration, the indebtedness, liability or

> obligation of any corporation or individual due this state or any county or municipal corporation …

This restriction, or one like it, has been part of the fundamental law of the State of Missouri since our Constitution of 1875. *First National Bank of St. Joseph v. Buchanan County*, 205 S.W.2d 726, 731 (Mo. 1947). A law enacted by the General Assembly and signed by the Governor clearly and undoubtedly violates this constitutional restriction if it releases a taxpayer from a tax liability on income received before the law is effective. *Graham Paper Co. v. Gehner*, 50 S.W.2d 49, 52 (Mo. banc 1933). A law also clearly violates this constitutional restriction if it releases a taxpayer from a tax liability, the amount of which is a fixed, sum certain. *See Beatty v. State Tax Comm'n*, 912 S.W.2d 492, 498 (Mo. banc 1995) (holding constitutional restriction not violated under facts of that case).

Article III, Section 39(5) is a provision of great breadth:

> The language of this constitutional provision is very broad and comprehensive in protecting the state against legislative acts impairing obligations due to

> it, in that it prohibits the release or extinguishment, in whole or in part, not only of indebtedness to the state, county, or municipality, but liabilities or obligations of every kind.

Graham Paper, 50 S.W.2d at 52.

Beatty is not to the contrary. In *Beatty*, this Court held that a law changing the real property tax classification of multifamily apartment buildings from commercial to residential, effective in the year of its enactment, did not violate Article III, Section 39(5). This Court held that while the new law became effective on August 28 of the tax year it was affecting, it did not release an apartment building owner from part of any existing real property tax liability because the specific dollar amount of his tax liability is not determined and known until September 20 of any tax year. "On August 28, 1995, H.B. 211 could not extinguish or release any taxpayer's indebtedness, liability or obligation because no taxpayer's tax liability had been determined by that date." *Beatty*, 912 S.W.2d at 498.[2]

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[2] In a footnote, this Court stated: "Had it been pled and proven that the tax levy was set prior to August 28, the Court would have, of

Here, in contrast, the amount of the room tax liability on any transaction involving a sleeping room is fixed and determined no later than the date upon which a transient guest has both used and paid for his or her sleeping room, although the tax may not need to be paid more frequently than quarterly. *See* Section 67.624.1.

To establish that House Bill 1442 violates Article III, Section 39(5), and therefore cannot lawfully be applied to bar the County's and the CVC's claims against Resellers, appellants must show that the bill did not clarify existing room-tax laws, but instead changed them so as to release Resellers from an existing indebtedness to the taxing authorities for rooms sold before the effective date of the bill's enactment into law. County and CVC submit they can establish that House Bill 1442 violates Article III, Section 39(5) by showing the following:

First, that the taxes authorized by Sections 67.619 and 67.657 as they existed prior to the enactment of House Bill 1442 were imposed upon

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course, been presented with a different situation." *Beatty*, 912 S.W.2d at 497 n. 1.

the amount paid by a transient guest for his or her room and not upon the potentially lesser amount an operator received for such room;

Second, that House Bill 1442 altered the existing room-tax statutes by basing the room tax upon the amount collected by the operator and not the amount paid by the transient guest, and by exempting Resellers from any obligation to collect and remit such taxes; and

Third, that a taxpayer's liability to pay room taxes under the statutes as they existed prior to the enactment of House Bill 1442 was fixed as of the date a transient guest used the room for which he or she had paid, and the amount of such tax liability was not contingent upon any subsequent event or occurrence.

A. The statutes and ordinances as they existed before the enactment of House Bill 1442 imposed a tax on the amount a transient guest paid for a room and not on the amount the operator received in payment for such room; House Bill 1442 changed this.

In all statutory interpretations, the starting point is the language used in the statute. If the statutory language is clear and unambiguous,

then the language used is also the end point for the analysis. "When statutes are clear and unambiguous, courts do not resort to rules of statutory construction." *Ehlmann*, 323 S.W.3d at 790. "[W]here a statute's language is clear and unambiguous, there is no room for construction." *Wolff Shoe Co. v. Director of Revenue*, 762 S.W.2d 29, 31 (Mo. banc 1988).

To determine whether the legislature effected a change, rather than a clarification, we must first examine Sections 67.619 and 67.657 as though House Bill 1442 had never been enacted. Only through such an exercise is it possible to determine whether House Bill 1442 altered the law or merely clarified it.

Section 67.619 authorizes the imposition of "a tax … *on the amount* of sales or charges for all sleeping rooms *paid by the transient guests* of hotels and motels…" (emphasis added).

Similarly, Section 67.657 authorizes the imposition of "a tax … *on the amount* of sales or charges for all sleeping rooms *paid by the transient guests* of hotels and motels…"

In both cases, the statutes refer to the amount *paid by the transient guests*. This language is "plain and clear to one of ordinary intelligence…"

Wolff Shoe, 762 S.W.2d at 31. Neither statute refers to the amount *received by* whomever is selling the right to use the room.

The prior statutory language is therefore in direct contradiction to the new rule established by House Bill 1442, which states that one is to calculate the tax on the amount *received by the operator without regard to the amount paid by the transient guest*:

> Notwithstanding any other provisions of law to the contrary, any tax imposed or collected … on or related to any transient accommodations … *shall apply solely to amounts actually received by the operator* of a hotel, motel, tavern, inn, tourist cabin, tourist camp, or other place in which rooms are furnished to the public.… This section is intended to clarify that taxes imposed as a hotel tax, occupancy tax, or otherwise, *shall apply solely to amounts received by operators*, as enacted in the statutes authorizing such taxes.

House Bill 1442, § 1 (emphasis added).

Thus, with regard to what forms the basis of the room tax, House Bill 1442 does not clarify the prior-existing statutes. It changes them. The prior statutory language focused on the amount paid by the transient guest. The new statutory language focuses on the amount received by the operator. As alleged in the petition, these two amounts are frequently different — and are always different when a Reseller is involved.

Other room-tax-authorizing sections in Chapter 67 also phrase the imposition of the tax in terms of the amounts *paid by* the transient guest and not in terms of the amount received by the operator. *See*, *e.g.*, Sections 67.619.1, 67.665.1, 67.671.4(2), and 67.1000–67.1018.

The divergence between House Bill 1442 and prior-existing law continues with the bill's provision that the tax is only imposed upon the operator of a hotel or motel, and that Resellers and other intermediaries are expressly defined not to be operators. House Bill 1442 states:

> Under no circumstances shall a travel agent or intermediary be deemed an operator of a hotel, motel, tavern, inn, tourist cabin, tourist camp, or other place in which rooms are furnished to the

> public unless such travel agent or intermediary actually operates such a facility.

This provision does not clarify the prior-existing statutes. It changes them. Section 67.624, RSMo., which describes the persons subject to the Section 67.619 room tax, states:

> *Every person receiving any payment or consideration* upon the use of any sleeping room from the transient guest or guests of any hotel or motel, subject to the tax imposed by the provisions of sections 67.601 to 67.626, *is exercising the taxable privilege of operating* or managing a business subject to the provisions of sections 67.601 to 67.626 and *is subject to the tax authorized by section 67.619*....

Section 67.624.1 (emphasis added); *see also*, *e.g.*, Sections 67.665.2 (imposing tourism tax upon the person who collects money from transient guest).

In other words, anyone who receives money from a transient guest for the use of a sleeping room is subject to the room tax established by

Section 67.619. Until House Bill 1442 was enacted, the persons who would have been included in the group of those who received a payment from a guest for a room would have included the Resellers, but would not have included the operators, who receive no money directly Reseller's transient-guest customers for their rooms. Thus, House Bill 1442's assertion that under no circumstance shall a Reseller be subject to a room tax is directly contrary to the express terms of the law as it existed before the bill's enactment.

B. Enactment of House Bill 1442 did not clarify the existing room tax statutes, but changed them, notwithstanding the assertion in the bill that it was intended to clarify.

This Court and the Court of Appeals recognize that the legislature's amendment of a statute is sometimes intended not to change the statute but to clarify it:

> While it is presumed that in enacting a new statute or amending an existing one, the legislature intended to effect some change in the existing law, it is

> also true that the purpose of a change in the statute can be clarification.

Self v. Midwest Orthopedics Foot & Ankle, P.C.,272 S.W.3d 364, 370 (Mo. App. 2008) (internal quotations omitted), quoting *Missouri Comm'n on Human Rights v. Red Dragon Restaurant, Inc.*, 991 S.W.2d 161, 167 (Mo. App. 1999) *(quoting Mid-America Television Co. v. State Tax Comm'n*, 652 S.W.2d 674, 679 (Mo. banc 1983)). The normal assumption, however, is that the legislature intended to change the law. *Missouri Soybean Ass'n v. Missouri Clean Water Comm'n*, 102 S.W.3d 10, 33 n.23 (Mo. banc 2003); *Kilbane v. Director of Dept. of Revenue*, 544 S.W.2d 9, 11 (Mo. banc 1976) (citations omitted).

Here, Section 1 of House Bill 1442, codified at Section 67.662, states that the legislative intent of that section was to clarify the existing law: "This section is intended to clarify that taxes imposed as a hotel tax, occupancy tax, or otherwise shall apply solely to amounts received by operators, as enacted in the statutes authorizing such taxes."

This appeal, therefore, presents the issue of whether the General Assembly's assertion that its enactment of Section 1 of House Bill 1442

merely clarifies the law is dispositive and binding on this Court, or whether the Court has the inherent power to examine the new statute and determine for itself whether it effected a change in the law.

All due deference to the General Assembly notwithstanding, its assertion that a new statute merely clarifies the law is not binding on this Court.'" It is emphatically the province and duty of the judicial department to say what the law is,' and to determine the constitutionality of statutes." *Missouri Coalition for the Environment v. Joint Committee on Administrative Rules*, 948 S.W.2d 125, 132 (Mo. banc 1997), quoting *Marbury v. Madison*, 1 Cranch 137, 5 U.S. 137, 2 L. Ed. 60 (1803). This is as true for the Missouri Supreme Court as it is for the United States Supreme Court. If the General Assembly's assertion that a new statute is merely clarifying were binding on this Court, then the General Assembly could block this Court from ever invalidating a retrospective statute by including such clarification language at will.

"This Court has consistently held that the doctrine of separation of powers, as set forth in Missouri's constitution, is vital to our form of government because it prevents the abuses that can flow from centralization

of power." *Missouri Coalition*, 948 S.W.2d 125 (citations and internal quotations omitted). While *Missouri Coalition* concerned legislative intrusion into the executive branch, through the General Assembly's creation of a special committee asserting control over administrative rulemaking, its holding is as applicable to legislative intrusions into the independent operation of the judicial branch. *See State ex rel. Pollock v. Becker*, 233 S.W. 641 (Mo. banc 1921).

State ex rel. Pollock held that the courts are not bound by the General Assembly's declaration that a statute was "necessary for the immediate preservation of the public peace, health or safety" of the state, and therefore exempted from being submitted to the people for a referendum as then provided under the Missouri Constitution of 1875, Article IV, Section 57. *Id.*, 233 S.W. at 644-45.

The holding in *State ex rel. Pollock* continues to be followed today:

> Cases which construed this provision held that, while great weight is to be given to the legislative declaration that a law is necessary to the immediate preservation of the public peace, health

> or safety, *whether an act is actually necessary* for the immediate preservation of the public peace, health or safety *is a judicial question*.

Murray v. City of St. Louis, 947 S.W.2d 74, 79 (Mo. App. 1997) (emphasis added), citing *State ex rel. Pollock* and other authority.

The same rule should apply here to the General Assembly's declaration that a new law merely clarifies existing law. While the declaration should be given respect, ultimately the determination is the Court's.

The preceding section details some of the changes that House Bill 1442 made with respect to room taxes. These changes should be sufficient to establish that the bill was not a mere clarification of the existing law.

The conclusion that the new statute here, House Bill 1442, materially changes existing law and is not merely clarifying is supported by this Court's decision in *Mid-America Television*, *supra*.

Mid-America Television involved an amendment to state tax laws concerning the imposition of income tax on corporations that are part of a consolidated group for federal tax reporting. The prior law created "difficulties" in determining the tax the component corporation owed. These

difficulties related largely to uncertainties as to the year in which the corporation could take its deductions due to confusion concerning the word "assessed" used in the statute. *Mid-America Television*, 652 S.W.2d at 678.

The General Assembly amended the statute. "The 1973 amendment avoids the aforementioned procedural problems by changing the year in which the deduction is allowed from the year the taxes were 'assessed' to the year for which the return was filed." *Id.* at 679. The appellants in *Mid-America Television* argued that the new statute had changed the law. This Court agreed that there was a change, but determined that the changes were essentially procedural, not substantive, and merely clarified the previously-existing law without making any substantive changes to the corporate taxpayer's rights and obligations:

> On the contrary, as demonstrated above, numerous changes have been effected, but with respect to the matter of deduction the changes go to the timing of the deduction and not to the issue at hand. We are convinced that the change in the Missouri federal income tax deduction statute was not concerned

> with the amount of the deduction, but with the many procedural irregularities that arose under the prior statute.

Id.

Here, in contrast with *Mid-America Television*, the changes enacted by the General Assembly in passing House Bill 1442 did not merely make procedural changes without changing the substance or fixing a confusion caused by an ambiguous word choice in the prior law. Here, the changes changed the substance of the law — what sum was to be taxed and who was to be subject to the tax — and thus were not merely a clarification of the existing law.

C. The taxpayers' liability for the room tax on rooms sold to transient guests was a fixed liability to the County, both on its own behalf and as collector for the CVC, not contingent upon any subsequent event or occurrence, at the time House Bill 1442 became effective.

As demonstrated above, House Bill 1442 changed the prior law concerning the calculation and imposition of room taxes. Nevertheless, the

bill does not violate the restrictions imposed by Article III, Section 39(5), unless the amounts owed by the Resellers for room taxes at the time the new law went into effect were fixed, sums certain. *See Graham Paper* and *Beatty*, *supra*. The taxes owed were such fixed, sums certain, and the bill released the Resellers of their obligation to pay these taxes in violation of the Missouri Constitution.

Section 67.619 imposes "a tax not to exceed three and three-fourths percent on the amount of sales or charges for all sleeping rooms paid by the transient guests of hotels and motels situated within the city and county involved, and doing business within such city and county." Section 67.619.1. The section further provides: "the commission shall have the authority to collect a penalty of one percent and interest not to exceed two percent per month on unpaid taxes which shall be considered delinquent thirty days after the last day of each quarter." Section 67.619.6. The related provision, Section 67.624 states in relevant part:

> 1. Every person receiving any payment or consideration upon the use of any sleeping room from the transient guest or guests of any hotel or motel,

subject to the tax imposed by the provisions of sections 67.601 to 67.626, is exercising the taxable privilege of operating or managing a business subject to the provisions of sections 67.601 to 67.626 and is subject to the tax authorized by section 67.619. Such person shall be responsible not only for the collection of the amount of the tax imposed on the business to the extent possible under the rules and regulations promulgated by the commission pursuant to the provisions of sections 67.601 to 67.626, *but shall, on or before the last day of the month following each calendar quarterly period of three months, make a return to the commission or its designated collector showing the gross receipts and the amount of tax levied pursuant to section 67.619 for the preceding quarter, and shall remit with such return, the tax so levied*.

> 2. The person operating or managing the business described in subsection 1 of this section shall collect the tax from the transient guest or guests to the extent possible under the provisions of sections 67.601 to 67.626, *but the inability to collect any part or all of the tax does not relieve that person of the obligation to pay to the commission the tax imposed* by section 67.619.

Section 67.624.1-.2 (emphasis added).

These statutory sections establish the fixed and non-contingent nature of the room taxes imposed under Section 67.619.

Similarly, for Section 67.657, the statute provides that the CVC may appoint the County Collector of Revenue to collect the room tax, which amount shall be deposited in the CVC's accounts not less than 30 days after the end of each month. The County's implementing ordinance, however, allows operators to file and pay their room tax to the County's licensing director on a quarterly basis, with the tax return and payment

made within 20 days after the end of each quarter. Section 502.183, St. Louis County Code (Ordinance No. 9956, enacted Oct. 27, 1980).

Given that both taxes are based on a fixed percentage of the amount paid by transient guests to obtain a room subject to the tax, the amounts of the taxes owed appear fixed and non-contingent, at least for purposes of determining whether the petition can withstand a motion to dismiss.

For all these reasons, the Circuit Court erred in granting the Resellers' motion to dismiss based on their contention that Section 1 of House Bill 1442, codified as Section 67.662, clarified existing law and established that the County and the CVC never had a claim against the Resellers for payment of room taxes.

Instead, to the extent that the bill attempted to retrospectively release the Resellers from their indebtedness to the County and the CVC for past-due room taxes, the bill was unconstitutional in violation of Article III, Section 39(5), and must be held to be ineffective to release or extinguish the Resellers' tax liability.

The judgment below should be reversed and the case remanded for further proceedings.

II. The Circuit Court erred in dismissing the petition in reliance upon House Bill 1442 because the bill is unconstitutional in violation of Article III, Sections 21 and 23 of the Missouri Constitution and unenforceable in that the bill contains more than one subject, not all of which are clearly expressed in its title, and was amended in its passage so as to change its original purpose.

Article III, Section 21 of the Missouri Constitution states: "No law shall be passed except by bill, and no bill shall be so amended in its passage through either house as to change its original purpose."

Article III, Section 23 of the Missouri Constitution states: "No bill shall contain more than one subject which shall be clearly expressed in its title…"

"Both provisions set out procedures the General Assembly must follow to ensure that the bills it introduces can be easily understood and intelligently discussed, both by legislators and the general public." *Rizzo v. State*, 189 S.W.3d 576, 578 (Mo. banc 2006) (citations omitted).

The enactment of House Bill 1442 clearly and undoubtedly violated the constitutional procedural requirements established by Article III, Sections 21 and 23:

- The bill contains more than one subject.
- The bill's title of "relating to taxes" is unclear, as it is both (1) *underinclusive*, in that the bill includes provisions that do not relate to taxes, and (2) *overinclusive*, in that the phrase "relating to taxes" is too broad and amorphous to apprise legislators or the public of the content of the bill. *See Homebuilders Assoc. of Greater St. Louis v. State*, 75 S.W.3d 267, 270, 272 (Mo. banc 2002) (invalidating as both under- and overinclusive bill whose title stated it was "relating to property ownership").
- The bill contains provisions unrelated to its original purpose of "relating to city sales taxes" [*Appendix* A-13], and also unrelated to its final purpose of "relating to taxes." [LF 111 (also reproduced at *Appendix* A-38)].

Consequently, House Bill 1442 is invalid in its entirety. *Homebuilders*, 75 S.W.3d at 272 ("in a case of an overinclusive title … the entire bill

will normally be found invalid"). The Circuit Court therefore erred in relying upon House Bill 1442 in dismissing the petition below.

A. General rules of law applicable to challenges based upon alleged violations of the original purpose, single subject, and clear title requirements of the Missouri Constitution.

As a general matter, statutes passed by the legislature are presumed valid. "Attacks on the constitutional validity of statutes on the basis of procedural defect are not favored. Indeed, acts of the legislature carry with them a strong presumption of constitutionality. As such, this Court resolves all doubts in favor of the procedural and substantive validity of the act. The party attacking the statute must show that a constitutionally required procedure has been 'clearly and undoubtedly' violated." *Rizzo*, 189 S.W.3d at 578 (citations omitted); *Hammerschmidt v. Boone County*, 877 S.W.2d 98, 102 (Mo. banc 1994).

The term, "original purpose," as used in Article III, Section 21, "refers to the general purpose of the bill. The restriction is against the introduction of matter that is not germane to the object of the legislation or that is unrelated to its original subject. The original purpose of a bill

must be measured at the time of the bill's introduction." *Missouri Association of Club Executives v. State*, 208 S.W.3d 885, 888 (Mo. banc 2006) (invalidating provisions regulating adult entertainment from bill originally introduced as "relating to intoxication-related traffic offenses").

> Where the challenge to a law is … to the number of subjects it contains and the bill's title fails to express the subject of the bill with reasonable precision, we look to the Constitution as a whole. The constitution is divided into separate articles … The organization of the constitution creates a presumption that matters relating to separate subjects therein described should … not be commingled under unrelated headings. The organizational headings of the constitution are strong evidence of what those who drafted and adopted the constitution meant by "one subject."

Hammerschmidt, 877 S.W.2d at 102 n.3 (citations and internal quotation omitted). *Hammerschmidt* invalidated a bill allowing a county to adopt a

county constitution as outside the scope of a bill "relating to elections," even though the constitution would necessarily have been adopted through an election.

> Where an amorphous title to a bill renders its subject uncertain, but the party challenging the bill claims a "one subject" violation … the Court may determine the subject of the bill from two sources. First, the constitution itself is organized around subjects to which we can refer in determining the meaning of the single subject requirement. Second, the Court may examine the contents of the bill originally filed to determine its subject.

Carmack v. Director, Missouri Dept. of Agriculture, 945 S.W.2d 956, 960 (Mo. banc 1997) (holding that portion of bill involving program administered by the Department of Agriculture is outside the scope of the subject "relating to economic development," even though agriculture is an important part of the Missouri economy, because the Missouri Constitution

places the administration of all matters relating to economic development under the Department of Economic Development).

"The test for whether a bill contains a single subject focuses on the title of the bill.... A bill contains one subject if all provisions of the bill fairly relate to the same subject, have natural connection therewith or are incidents or means to accomplish its purpose." *Missouri Health Care Assoc. v. Attorney General*, 953 S.W.2d 617, 622 (Mo. banc 1997) (subject of bill "relating to the Department of Social Services" is not broad enough to encompass amendments to the "Merchandising Practices" chapter of the Missouri Revised Statutes, even though the entities to be affected by the amendments are regulated by the Department of Social Services; citations and internal quotations omitted).

"[T]o survive a clear title challenge, a bill's title need not give specific details of a bill, but need indicate only generally what the act contains." *St. Louis Health Care Network v. State*, 968 S.W.2d at 145, 147 (Mo. banc 1998).

> The title cannot, however, be so general that it tends to obscure the contents of the act. In addition,

> the title cannot be so broad as to render the single subject mandate meaningless. If the title of a bill is too broad or amorphous to identify a single subject within the meaning of article III, section 23, then the bill's title violates the mandate that bills contain a single subject clearly expressed in its title.

Id. (holding bill's title of "relating to certain incorporated and non-incorporated entities" too broad to satisfy constitutional requirements; citations omitted).

B. Examination of the history and contents of House Bill 1442 from its introduction to its enactment.

The various versions of House Bill 1442, along with the summaries and committee reports issued at each stage, are reproduced in the Appendix to this brief at pages A-13 through A-82. The section of the bill most relevant to this appeal, as codified at Section 67.662, RSMo., is reproduced in the Appendix at page A-83.

As originally introduced, House Bill 1442 was titled, "An Act to repeal sections 94.510, 94.550, and 94.577, RSMo, and to enact in lieu thereof three new sections relating to city sales taxes." [A-13]. The bill was seven pages long, and only affected three closely-related sections in a single chapter. That chapter was Chapter 94, "Taxation in Other Cities," which is part of Title VII, "Cities, Towns, and Villages," of the Revised Statutes of Missouri. The original bill did not mention room taxes, hotel and motel taxes, or tourist taxes, and did not mention Resellers.

The summary that accompanied the bill described its purpose as capping the city sales tax rate charged by the City of St. Louis at 2% and as capping the capital improvements city sales tax rate charged by cities not in St. Louis County at 1%. [A-20].

The report of the Special Committee on General Laws issued upon committee approval of the original House Bill 1442 discussed the problem the bill was intended to address:

> Supporters say that the bill clarifies existing law regarding the enactment of multiple sales taxes for the purpose of capital improvements or general

> revenue. The Department of Revenue has authorized "stacking" of taxes in these areas if approved by voters pursuant to its interpretation of existing state statutes. Uncertainty in the application of the law prevents possible funding for municipal projects, and an unfavorable court decision would be harmful to the finances of the cities of Joplin and St. Joseph which have relied upon the department's position. Circuit courts are split on the issue of "stacking" taxes. Currently, all litigation against municipalities has been dismissed without prejudice.

[A-21 to A-22].

The next, or "perfected," version of the bill was little changed from the original. The title now read, "An Act to repeal sections 67.1360, 94.510, 94.550, and 94.577, RSMo, and to enact in lieu thereof six new sections relating to city sales taxes." [A-23]. Thus, one additional section was being repealed and three additional new sections were enacted. The length of the

bill increased to 13 pages. [A-23 to A-35]. The new section being repealed was located in Chapter 67, "Political Subdivisions, Miscellaneous Powers," which is part of Title VI, "County, Township and Political Subdivision Government," and some of the to-be-enacted sections were also located in Chapter 67.

Of particular note for purposes of this appeal, the perfected bill introduced sections authorizing additional classifications of cities to enacted room taxes. The future Section 1 of House Bill 1442, excluding Resellers from those obliged to pay room taxes, was not yet part of the bill.

The summary issued with the perfected bill notes that the bill would allow North Kansas City, the City of Grandview, and the cities of Ashland and Sugar Creek, and the county of Montgomery to impose room taxes upon transient guests for the promotion of tourism and, in the case of North Kansas City, for infrastructure improvements. [A-36].

The "truly agreed to and finally passed" version of House Bill 1442 looks substantially different from the earlier version. The differences start with the title, which now reads, "An Act to repeal sections 67.1000, 67.1360, 67.1361, 67.2000, 70.220, 94.510, 94.577, 94.900, 94.902, 138.431,

and 144.030, RSMo, and to enact in lieu thereof nineteen new sections relating to taxes, with an emergency clause for a certain section." [LF 111 (A-38)].

Thus, the number of sections repealed had increased from three to four to now 11, while the number of new sections to be enacted increased from three to six to now 19. The number of chapters including section repealed by the bill increased from one to two to now five (six chapters had new provisions enacted) located in three separate titles. The new title affected by the bill was Title X ("Taxation and Revenue"). The length of the bill also increased substantially, from seven pages to 13 pages to now 42 pages. [LF 111-52 (A-38 to A-79)].

The provision at issue in this appeal was added in the final version of the bill. This provision was designated as "Section 1." Section 1 was not designated to be codified in any specific chapter or section of the revised statutes.

A walk through House Bill 1442 demonstrates that while many of its provisions concerned "taxes," chiefly room taxes, other provisions did not:

House Bill 1442 enacts the "Exhibition Center and Recreational Facility District Act," Section 67.2000. [LF 118-25 (A-45 to A-52)]. The purpose of this act is to authorize the creation of a district to plan, develop, construct, acquire, maintain, or operate a single exhibition center and recreational facilities within the district, where "recreational facilities" are defined to mean "locations explicitly designated for public use where the primary use of the facility involves participation in hobbies or athletic activities." [LF 122 (A-49)].

Significantly, Section 67.2000 authorizes the District to enter into contracts, borrow money, issue bonds, notes, and other obligations to be secured by real estate and repaid by the revenues from its activities. [LF 122 (A-49)].

While Section 67.2000 authorizes the imposition of a sales tax [LF 123-24 (A-50-51)], all kinds of governmental entities are authorized to impose taxes. The primary purpose of the Section 67.2000 is to create district, which are governmental entities, to run exhibition centers and recreational facilities.

House Bill 1442 also authorizes, though Section 70.220, any municipality or political subdivision to enter into cooperation agreements with other municipalities and political subdivisions, or agencies of the United States or other states, "for the planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service." It also provides that such cooperating entities that share a common border may enter into agreements to share tax revenues. [LF 125-26 (A-52 to A-53)].

House Bill 1442 also authorizes a new real property tax that would be outside the subject of "sales tax" under which the bill was first introduced. This is a real property tax designated to fund a "Cemetery Maintenance Trust Fund" within certain towns, villages, and cities. [LF 140-41 (A-67 to A-68)].

House Bill 1442 also changes the procedure in administrative hearings in the State Tax Commission under Section 138.431, RSMo., relating to the right to appeal assessments of real and tangible personal property. [LF 141-43 (A-68 to A-70)].

C. Application of the general rules to House Bill 1442.

The subject of "taxes," like the subject of "economic development," is so broad that it gives no guidance to what might be in a particular bill unless one confines the inquiry to what is within the scope of the Article concerning "taxes" in the Missouri Constitution. *See Carmack*, 945 S.W.2d at 960.

Our Missouri Constitution includes an Article titled, "Taxation." This is Article X. If all of the provisions repealed or enacted in House Bill 1442 come within the scope of this Article, then the scope of the bill may be appropriate. If any of the provisions do not fall within the scope of that Article, then the bill clearly and undoubtedly contains more than one subject matter. *Carmack*, *supra*.

While the County and CVC contend that multiple provisions of House Bill 1442 fall outside the original purpose of "city sales tax" — the Cemetery Maintenance Fund *real property* tax being one of them — it is sufficient to focus attention on two of the provisions enacted through this bill, Sections 67.2000 and 70.220 to demonstrate that the bills involve more than one subject.

Section 70.220 provides for cooperation agreements between by municipalities and political subdivisions with each other and with agencies of the United States or other states. This statute clearly falls within the scope of Article VI, Section 16 of the Missouri Constitution — part of the title concerning "Local Government" rather than "Taxation" — which states:

> Section 16. Cooperation by local governments with other governmental units.—Any municipality or political subdivision of this state may contract and cooperate with other municipalities or political subdivisions thereof, or with other states or their municipalities or political subdivisions, or with the United States, for the planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service, in the manner provided by law.

Thus Section 70.220 enacted by House Bill 1442 clearly and undoubtedly concerns a different subject than the "taxes" stated in the title of the bill.

Section 67.2000, the "Exhibition Center and Recreational Facility District Act," is another provision that does not relate to the subject of taxes or taxation, although it is not clear precisely which constitutional provision authorizes this act.

In short, the title of House Bill 1442 is so general that it did not fairly advise the legislature, or the public, what was contained therein. At the same time, there were provisions contained within House Bill 1442 that cannot fairly be said to fall within the common understanding of "taxes." Moreover, the nature of the bill changed dramatically from its original purpose of "city sales tax," so that upon enactment it was no longer recognizable as the bill that was originally introduced.

For all these additional reasons, House Bill 1442 was unconstitutionally enacted and should be invalidated.

CONCLUSION

The judgment below should be reversed and this case remanded.

Respectfully submitted,

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ATTORNEY'S CERTIFICATE AND CERTIFICATE OF SERVICE

Pursuant to Rule 84.06(c), the signing attorney certifies:

1. This Appellants' Brief filed January 21, 2011, on behalf of appellants complies with the requirements of Rule 55.03.

2. The brief complies with the limitations in Rule 84.06(b).

3. The brief contains 8,349 words, *including* the cover, table of contents, table of authorities, signature block, and this certificate, all of which are permitted to be excluded from the count.

4. Electronic copies of the brief, in both WordPerfect and Adobe PDF format, are on the enclosed disk, and have been scanned for viruses and are virus-free.

5. One copy of the brief, and of the separately-bound Appendix to the brief, and a duplicate of the disk filed with the Court, have been served on the Attorney General of the State of Missouri and counsel of record for respondents January 21, 2011, by mailing the same by U.S. Mail, first-class postage prepaid, to (list on next page):

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