IN THE MISSOURI SUPREME COURT

Appeal No. SC 91228

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

Appellants,

vs.

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

Respondents.

Appellants' Reply Brief

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REPLY ARGUMENT

I. The County and the Commission did not waive their constitutional argument under Article III, Section 39(5) of the Missouri Constitution.

Respondent Resellers contend the County and Commission waived their argument that House Bill 1442 unconstitutionally violates Article III, Section 39(5) of the Missouri Constitution because the County and Commission failed to raise that particular constitutional challenge to House Bill 1442 "at the first available opportunity — in response to the [Resellers'] *Motion for Reconsideration*." *Resellers' Brief* at 11.

Resellers' position should be rejected for several reasons.

First, Resellers' notion that the County and the Commission should have raised the issue in response to their so-called "motion for reconsideration" is flawed. Missouri law does not recognize a motion for reconsideration. *Koerber v. Alendo Bldg. Co.*, 846 S.W.2d 729 (Mo. App. 1992).

> "No Missouri Supreme Court Rule sanctions the use of a motion for reconsideration. Such motions are mentioned in the rules only twice, and in both

> instances the rules provide they shall *not* be filed. *See* Rules 83.03 and 84.24. As this court has stated, a motion for reconsideration has no legal effect as no Missouri rule provides for such a motion.

Id. at 730 (internal quotations and brackets omitted).

"Generally speaking, motions for reconsideration have no legal effect because the Missouri Rules of Civil Procedure do not recognize such a motion. We recognize that litigants will often attempt to use motions for reconsideration as a vehicle for re-arguing the motion or topic that was previously denied by the trial court, but we discourage any procedural motion practice that is not authorized by rule or law." *Agnello v. Walker*, 306 S.W.3d 666, 674 (Mo. App. 2010). *See also Scott v. Flynn*, 936 S.W.2d 173, 174 (Mo. App. 1996), where the Court of Appeals dismissed an appeal from an order denying a motion for reconsideration, holding: "Therefore, the order denying Campbell's motion for reconsideration, which is the only order specified as the subject of this appeal, is a nullity. This leaves nothing before us for review. Accordingly, we dismiss the appeal."

Thus the Resellers' contention that the County and Commission have waived a constitutional argument because they did not raise it in response to a legal nullity to which no response is required is incorrect. If Resellers' position were correct, it would raise this legal unrecognized nullity, the motion for reconsideration, to a position of eminence that our Rules of Civil Procedure do not provide it.[1]

The Resellers' position is particularly troubling here, where the order that Resellers sought to have reconsidered was the order denying their motion to dismiss the petition. That is because a plaintiff has no obligation to respond to a motion to dismiss, and is free — should the motion to dismiss be granted — to raise on appeal all of the grounds he might have for reinstatement of his petition even though no opposition to the motion

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[1] Resellers had at least two vehicles recognized by the rules by which they could have raised the legislative change and required a response by the County and Commission. Resellers could have file a motion for judgment on the pleadings under Rule 55.27(b), or a motion for summary judgment under Rule 74.04.

to dismiss was filed. *Saidawi v. Giovanni's Little Place, Inc.*, 987 S.W.2d 501, 504 (Mo. App. 1999).

> Defendants also argue that because Plaintiff failed to present these arguments to the trial court, none of the allegations of error contained in Plaintiff's brief have been preserved for review. We disagree. On a motion to dismiss for failure to state a claim, defendant bears the burden of establishing that the elements pled by plaintiff fail to state a cause of action. Plaintiff has no duty to respond to defendant's motion to dismiss.

Id.; *Weicht v. Suburban Newspapers of Greater St. Louis, Inc.*, 32 S.W.3d 592, 598 (Mo. App. 2000).

Thus, given that a plaintiff has no duty to respond to a defendant's motion to dismiss, but preserves all of her claims and arguments on appeal even if she remains silent in response to the motion, it would be peculiar indeed if the defendant's filing of an unauthorized and legally ineffectual motion for reconsideration of the denial of a motion to dismiss would

somehow require a response by the plaintiff, upon penalty of waiver if the response were not made. Yet that is exactly what Resellers contend in their brief on appeal.

Second, the purpose of the rule generally requiring a prompt assertion of constitutional challenges would not have been advanced if the County and Commission's opposition to the motion for reconsideration had included a reference to Article III, Section 39(5) of the Missouri Constitution along with its reference to other constitutional provisions violated by House Bill 1442. [LF 153]. The purpose of the general rule is straightforward: raising constitutional issues at the earliest opportunity "is necessary in order to prevent surprise to the opposing party and to allow the trial court the opportunity to identify and rule on the issue." *Call v. Heard*, 925 S.W.2d 840, 847 (Mo. banc 1996).

Here, however, although the memo in opposition to the motion for reconsideration listed *four* separate sections of the Missouri Constitution violated by House Bill 1442, the Resellers filed no reply to the opposition. Even more tellingly, the trial court's order granting the motion for reconsi-

deration did not even acknowledge the constitutional challenges, stating in its entirety:

> Parties appear for argument on Defendants' Motion for Reconsideration. After hearing argument on said motion, the Court grants Defendants' Motion for Reconsideration. Accordingly, the Court also grants Defendants' Motion to Dismiss the entire case, with prejudice.

[LF 155].

In light of the fact that neither the Resellers nor the trial court addressed any of the constitutional challenges asserted in the memo in opposition to the motion for reconsideration, it is not reasonable to believe that either would have responded any differently if Article III, Section 39(5) had been included on the list of constitutional provisions violated by House Bill 1442. It is clear from the record that the absence of reference to this particular constitutional section from the opposition made no difference. Thus, neither the Resellers nor the trial court lost a real opportunity to respond to this constitutional challenge.

Third, consideration of the Article III, Section 39(5) constitutional issue is appropriate, even if the County and Commission were required to raise the issue in the trial court, because of the important public interest in resolving the constitutionality of the General Assembly's retroactive alteration of the hotel and tourist taxes, as described in the opening brief. *See, e.g., Callier v. Director of Revenue*, 780 S.W.2d 639 (Mo. banc 1989). The public interest arises from the fact that this case does not involve just the rights of an individual member of the public, but the taxing power and finances of St. Louis County, the most populous and among the most economically important counties in the state, and further implicates the taxing power and finances of dozens, if not hundreds, of other governmental units throughout the state.[2]

Callier, the first case cited by Resellers in support of their waiver argument, is an odd case, in that it taketh with the one hand and giveth

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[2] A review of CaseNet shows that actions similar to the one below have been brought against some or all of the Resellers by the City of Branson and by Jefferson City. The City of St. Louis has retained counsel for a similar lawsuit.

with the other. In *Callier*, the director of revenue refused to issue a school bus operator's permit because of plaintiff's almost 30-year-old criminal conviction for wife and child abandonment and non-support. *Id.* at 640. Callier filed a petition for review in which he asserted that the statute under which his permit was denied: "is: (a) A taking of Petitioner's permit to [sic] a school bus without due process of law. (b) Is an ex post facto punishment of Petitioner for a 1961 criminal offense. … (d) Is a denial of equal protection of the law." *Id.* The trial court held that if the statute were applicable to Callier, "it would be a taking of Petitioner's right to operate a school bus, if otherwise properly licensed, without due process of law." *Id.* The trial court also found an equal protection violation. *Id.* at 640-41.

Notwithstanding the foregoing, including the fact that the trial court had no difficulty in understanding and ruling upon the constitutional challenge raised by Callier, this Court held that Callier's petition was insufficient to raise a constitutional challenge to the statute. "The petition contains no designation of any constitutional section claimed to have been violated. It pleads no facts showing a constitutional violation." *Id.* at 642.

Thus this Court taketh away. But then this Court giveth back by nevertheless reviewing Callier's constitutional claims in light of the public interest in avoiding uncertainty concerning the constitutionality of the statute in question:

> *When the public interest is involved, these rules do not prevent this Court from deciding constitutional questions*....
>
> However, to so transfer the case [to the Court of Appeals] would create a degree of uncertainty concerning the validity of Section 302.272. Even though the question had not been raised, the circuit court found that section to be invalid for two reasons. It is in the public interest to determine if the entire act is invalid for the reasons expressed by the circuit court.

Id. at 641, 642 (emphasis added).[3]

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[3] *Callier* is also notable for the strong dissent authored by Chief Justice Blackmar, who stated:

Thus, this Court in *Callier* has recognized that it has the discretion to consider constitutional issues even if not properly preserved at trial, and that this Court ought to exercise its discretion to decide such constitutional cases when the public interest is involved — for example, when the impact of the constitutional question goes beyond just the parties in the case and affects the broader public, as it does here.

For all these reasons, the Resellers' contention that the Court should not reach the Article III, Section 39(5) issue should be rejected. The Court should proceed to consider this issue on the merits along with the other constitutional issues discussed in the opening brief.

> It is good to follow sound procedure and to prepare pleadings carefully, but litigants should not be obliged to jump through hoops to invoke the federal or the state constitution. I am confident that counsel and the trial court understood the point perfectly well. Important constitutional rights should not depend on technicalities.

Id. at 645 (Blackmar, C.J., dissenting).

II. The Hotel and Tourism Taxes, as they existed prior to enactment of House Bill 1442, clearly and undoubtedly imposed tax liability on Resellers because the statutes taxed every person receiving a payment for the use of a sleeping room based upon the amount paid by a transient guest without regard for the ownership of the room.

Most of the arguments made by the Resellers on the meaning of the Hotel and Tourism Tax statutes as they existed prior to the enactment of House Bill 1442, and whether those taxes as they then-existed were imposed upon Resellers, have already been addressed. *See Opening Brief* at 13-19, 25-29.

The County and Commission agree with the Resellers that analysis of a statute begins with the statute's language. *Resellers' Brief* at 13. We also agree that statutes must be read as a whole, that undefined words carry their plain meaning, and that the different provisions of a statute must be read in relation to each other. *Id.* at 13-14. Finally, we also agree that if a taxing statute is ambiguous, it must be construed against the taxing authority and in favor of the taxpayer. *Id.* at 13. However, "[t]ax exemptions are strictly construed against the taxpayer." *Branson Proper-*

ties USA, L.P. v. Director of Revenue, 110 S.W.3d 824, 825 (Mo. banc 2003).

Here, the language of the applicable statues is plain. There is no ambiguity. Thus, as Resellers contend, the function of the Court is to enforce the statutes according to their terms. *Id.* at 13, 14.

Because there are two taxes involved, each is addressed separately.

A. The Tourism Tax.

Sections 67.601 to 67.626, RSMo., establish a "Regional Convention and Visitors Commission" in the City of St. Louis and St. Louis County. Section 67.619 authorizes the Commission to impose a "Tourism Tax." Specifically, Section 67.619.1, authorized the Commission to impose

> 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…

While Section 67.619.1 does not state who is subject to the Tourism Tax, a companion provision, Section 67.624.1, does:

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

Therefore, every person receiving money for the use of a hotel or motel room within the City or County of St. Louis is subject to the Tourism Tax.

Note that the statute does *not* impose a geographical limit on where the person receiving money does business, or require that the person receiving money receive it at any specific geographical location. The only geographical location imposed by the statute is that the *hotel or motel* be situated within the City or County of St. Louis and be doing business within such jurisdiction. *Id.*

Contrary to Resellers' assertions, the statutory language does not require that the person receiving the money on which the Tourism Tax is imposed own the hotel or motel for which she receives money, or that she run or operate the hotel or motel. The statute imposes no such requirements, and the Resellers' assertion to the contrary is the result of their overenergetic use of ellipses in quoting the statute.

Resellers assert that the statute states:

> Like the Hotel Tax, the Tourism Tax states that the tax shall be collected by "[t]he person operating or managing the business…" that receives payment for "the use of any sleeping room…" § 67.624.1-2 RSMo. Further, Sections 67.624.1-2 place the burden to file a tax return on "[t]he person operating or managing the business" …

Resellers' Brief at 16 (emphasis deleted; brackets and ellipses in original).

This rephrasing of the statute is misleading, as it makes it appear that the statute states that the person operating or managing the hotel or

motel "business" is responsible for collecting the tax. But that is not what the statute states, as is demonstrated by quoting the provision at length:

> 67.624. 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....
>
> 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). Taken in full context, it is clear that the statute states that the *receiving* of the payments is "the business" being operated or managed and subjected to the tax.[4]

In other words, all that the statute requires for the imposition of the Tourism Tax is that a person receive money for the use of a hotel or motel

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[4] The Resellers' reliance on the Tourism Tax statute's definition of the "Hotel and motel industry" to create a different meaning for the phrase, "operating or managing a business," as used in Section 67.624, *see Resellers' Brief* at 17, is misplaced. The definition of "Hotel and motel industry" in Section 67.604(6) ties back to Section 67.601.2, which provides that out of the appointed Commission members, "not less than three members appointed by the county executive and not less than three members appointed by the city executive shall be individuals actively engaged in the hotel and motel industry…" Thus the statutory definition of the industry is not intended to state who is subject to the tax, but rather who is qualified to serve on the Commission.

room in St. Louis. Who owns the hotel — who manages the motel — these facts are not relevant to the question of who owes the tax. That is what the plain and unambiguous language of the statute states. And it was reasonable for the General Assembly to decide to impose this tax on the *money* being received, because without the receipt of money there is nothing with which to pay the tax.

The County and Commission do not contend that the Resellers own or operate any hotel or motel in the County. But such an allegation is not necessary to impose the Tourism Tax upon them. What is important is that the Resellers were operating a business of receiving payments for the use of sleeping rooms in the County. Under the statutes as they existed before House Bill 1442 was enacted, the Resellers were obliged to collect and remit the Tourism Tax by virtue of the mere fact that they "receiv[ed] … 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," and thus were "exercising the taxable privilege of operating or managing a business subject to the

provisions of sections 67.601 to 67.626 and [were] subject to the tax authorized by section 67.619." Section 67.624.1, RSMo.

It is true, as the Resellers state, that a hotel guest cannot stay a night with Expedia. *Resellers' Brief* at 18. But a hotel guest can spend a night at the Seven Gables Inn in Clayton, and whoever receives the payment for that stay, whether it is the operator of the Seven Gables or Expedia or one of the other Resellers, is obliged under Section 67.624 to collect the 3-3/4% Tourism Tax on that payment and to remit the tax collected to the Commission.

B. The Hotel Tax.

Sections 67.650 to 67.658, RSMo., establish a "Regional Convention and Sports Complex Authority" in the City of St. Louis and St. Louis County. In contrast to the Commission, the Authority is not authorized to impose a tax on hotel and motel rooms. Instead, Section 67.657.4 authorizes the County to impose a "Hotel Tax":

> In addition to any other tax imposed by law, and notwithstanding the provisions of subdivision (2) of subsection 5 of *section 67.619*, to the contrary, the

> governing body of the county may submit to the voters of the county a tax not to exceed three and one-half percent 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 67.657.4 (emphasis added).

As with Section 67.619.1, *supra*, Section 67.657.4 does not state who is subject to the Hotel Tax. In contrast with the Tourism Tax, however, there is no provision of the Hotel Tax specifically stating who is subject to the tax. But we are not left to guess what the legislature intended. The tool best equipped for such a task has such ancient roots that the Romans gave it a name: *in pari materia*. This Court recently reminded us that "in determining the intent and meaning of statutory language, the words must be considered in context and sections of the statutes *in pari materia*, as well as cognate sections, must be considered in order to arrive at the true meaning and scope of the words." *South Metro. Fire Prot. Dist. v. City of Lee's Summit*, 278 S.W.3d 659, 666 (Mo. banc 2009).

In other words, the "provisions of a legislative act are not read in isolation but construed together, and if reasonably possible, the provisions will be harmonized with each other." *Board of Education of St. Louis v. Missouri State Board of Education*, 271 S.W.3d 1, 16 (Mo. banc 2008).

Here, the best evidence of the legislative intent concerning the Hotel Tax comes from its sister tax, the Tourism Tax, which was passed in the same legislative session in 1988, is imposed on the same object (the money paid by transient guests for sleeping rooms), and which is directly referenced in the body of the Hotel Tax itself. *See* Section 67.657.4, *supra*. The Tourism Tax statute tells us, as discussed at length above, that every person who receives any payment for the use of a sleeping room is subject to that tax. Section 67.624.

Read *in pari materia*, the two taxes on the same transaction should be harmonized, thus instructing us that, under the Hotel Tax, the same rule applies as under the Tourism Tax, and the Hotel Tax must therefore be paid by every person who receives a payment for the use of any sleeping room in St. Louis County.

C. Hotel Tax: The County's ordinances.

Resellers focus much of their analysis on the enforcement provisions of the County ordinances to argue that the Hotel Tax applies only to the owners and operators of hotels, and not to those, like the Resellers, who merely get paid for selling or reselling sleeping rooms over the internet.

In short, Resellers argue that because some of the enforcement mechanisms adopted by the County are geared towards hotel and motel owners and not Resellers, this must mean that Resellers are not subject to the tax.

The conclusion does not logically follow. The question is not whether certain taxpayers can be subject to enforcement tools not available against other taxpayers; the question is who is obliged to pay the taxes. For example, the fact that Section 502.545 of the County ordinances allows the County to file a lien for unpaid Hotel taxes "in the St. Louis County Recorder's Office, or in the recorder's office of the city or county in which the owner(s) of the hotel or motel reside(s)," reflects that the County has an enforcement tool against those who have lienable property, and not that only those who have lienable property are subject to the tax.

Indeed, other provisions of the County ordinance parallel the statutory language with regard to what is taxed under the Hotel Tax. Section 502.500 of the County ordinances (emphasis added) states:

> Under and by authority of RSMo 67.657 (1989 Supp.), there is hereby imposed and levied within the boundaries of St. Louis County, Missouri, a tax of three and one-half (3 1/2) percent on the amount of sales or charges for all sleeping rooms *paid by the transient guests* of hotels and motels situated within St. Louis County, Missouri.

Similarly, Section 502.520 of the County ordinances (emphasis added) states:

> *The person, firm or corporation, subject to the tax imposed* by Section 502.500 shall collect the tax from the transient guests; and each such transient guest shall pay the amount of such tax to the person, firm or corporation directed to collect the tax imposed herein.

What is significant about these sections of the County ordinances is that Section 502.500 imposes the tax on the amounts *paid by the transient guests*, not the amount received by the hotel or motel owner, and that Section 502.520 obliges the person *subject to the tax* (and not the hotel owner or operator) to collect the tax from the transient guests. The fact that the person subject to the tax can be someone other than the owner of the hotel or motel is inherent in the language.

Moreover, other provisions of the County ordinances make it clear that the County knew how to refer specifically to the owners or operators of hotels and motels, as opposed to those subject to the tax, when that was the intent of the ordinance. *See, e.g.*, Section 502.530 of the County ordinances, which provides that persons "engaged in the business of operating a hotel or motel" shall complete and file tax forms designed by the County's Director of Revenue and remit their taxes with such form, and Section 502.545 of the County ordinances which authorizes the County to impose a lien upon property of the owner of the hotel or motel for which taxes are not paid when due.

The fact that the ordinances use vastly different phrases in different sections — "person, firm or corporation, subject to the tax imposed" in some, and "engaged in the business of operating a hotel or motel" in others — means that those phrases are intended to have different meanings. "[T]he [Resellers'] interpretation would require us to read the statute so that unlike terms have like meaning. The rule of construction is to the contrary: 'When different terms are used in different subsections of a statute, it is presumed that the legislature intended the terms to have different meaning and effect.'" *BHA Group Holding, Inc. v. Pendergast*, 173 S.W.3d 373, 378 (Mo. App. 2005), quoting *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 251-52 (Mo. banc 2003).[5]

[5] *Landman* was overruled on unrelated grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003).

D. The Resellers' reliance upon Missouri Department of Revenue letter rulings with respect to the application of a Branson tax is misplaced since this Court largely overruled those letter rulings.

As it did in the trial court, the Resellers rely on Missouri Department of Revenue letter rulings interpreting Branson's amusement park tax — but do not mention this Court's interpretation of the same tax, which overruled much of the Department's letter rulings. *See Resellers' Brief* at 20-21.

In *Music City Centre v. Director of Revenue*, 295 S.W.3d 465 (Mo. banc 2009), the plaintiff provided live theater entertainment. It sold tickets to performances through contractual arrangements with other Branson businesses. The Branson businesses who purchase the tickets would do one of three things: (1) resell the tickets for cash; (2) give the tickets away to customers; or (3) bundle the tickets with other goods and services and sell the package. Plaintiff paid sales tax on its sale of tickets to the Branson businesses, and then sought a refund of the taxes, arguing that its tickets sales were "for resale" and not "sales at retail."

In Missouri, "sales at retail" are taxed, but transactions made "for resale" are not, as Missouri will eventually collect its taxes upon the resale. *Id.* at 468. The purpose of the exemption for sales for resale is to prevent "double taxation." Missouri should not collect sales tax on the initial sale and then double dip on sale taxes by collecting again on the resale. *Id.*

Not surprisingly, this Court held that tickets that were resold, or bundled and resold, were exempt under the sales for resale exemption, as Missouri would collect its sales tax from the Branson businesses that sold, or bundled and resold the tickets. The plaintiff was liable, however, for the sale of tickets that were later given away by its customers (the Branson businesses) as there was no resale and the Branson businesses that gave tickets away could not be taxed for giving them away. *Id.* at 469. In this way, Missouri would not double dip but, would collect all of the taxes due.

In short, those tickets that were given away would be taxed to the plaintiff only at the initial sale while those that were resold (by themselves or as part of a bundled package) would be taxed upon the resale.

So, how do the parties in *Music City Centre* match with the parties in our case? The plaintiff theater in *Music City Centre* resembles the hotels and motels here. Each provides a particular service to the public — live theater or sleeping rooms — and each allows others to sell or resell their services to the public. The Branson businesses who resold the theater tickets resemble the Resellers here. The Branson businesses did not put on live theater shows, just as the Resellers do not operate hotels and motels. Nevertheless, this Court held that the Branson businesses were liable for the tax on the tickets they resold to the ultimate consumer. Here, similarly, the Resellers are liable for the tax on the sleeping rooms they resell to the ultimate consumers, the transient guests.

Thus, while there may be small nuggets in the letter rulings that support Resellers' arguments, the clear conclusion from this Court's decision on the same matter unequivocally instructs that Resellers were, in fact, liable for the taxes that County and Commission seeks to enforce under the laws as they existed before the enactment of House Bill 1442. The County and Commission are not trying to double dip and collect taxes twice. They, like the taxing authority in *Music City Centre*, are simply try-

ing to collect all of the taxes due on the sale of sleeping rooms by taxing the Resellers on the difference between the price received by the hotel and motel operators and the price that the transient guests actually pay.

III. The defective portions of House Bill 1442 are not severable so as to rescue the section at issue in this appeal.

Resellers' primary argument in the balance of their brief is that even if the various sections of House Bill 1442 have the constitutional flaws described in the Opening Brief, those flaws do not affect the constitutionality of the final section, "Section 1," the section at issue in this appeal, because the defective sections can be severed, leaving the balance of House Bill 1442 unaffected.

As a general matter, Section 1.140, RSMo., does mandate severance of the unconstitutional portions of a statute, stating:

> The provisions of every statute are severable. If any provision of a statute is found by a court of competent jurisdiction to be unconstitutional, the remaining provisions of the statute are valid unless the court finds the valid provisions of the statute

> are so essentially and inseparably connected with, and so dependent upon, the void provision that it cannot be presumed the legislature would have enacted the valid provisions without the void one; or unless the court finds that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

But while statutes are presumed to be severable, this is not an absolute. The "single subject" and "original purpose" restriction imposed by Article III, Sections 21 and 23, are designed to ensure that legislatures, and the public, can understand the purpose of a bill and to avoid the practice of "legislative logrolling," where unrelated matters are gathered together in a single bill to accumulate the votes of those who support the different matters but do not support the whole. These restrictions thus keep the legislative process open and honest, and violation of these restrictions can lead to the striking of the entire statute because the entire process, and not just a particular provision of a statute, was defective. *See*

Hammerschmidt v. Boone County, 877 S.W.2d 98, 103 (Mo. banc 1994), where this Court wrote:

> Where, as here, the procedure by which the legislature enacted a bill violates the Constitution, severance is a more difficult issue. When the Court concludes that a bill contains more than one subject, the entire bill is unconstitutional unless the Court is convinced beyond reasonable doubt that one of the bill's multiple subjects is its original, controlling purpose and that the other subject is not. In reaching this determination, the Court will consider
>
> > whether the additional subject is essential to the efficacy of the bill, whether it is a provision without which the bill would be incomplete and unworkable, and whether the provision is one without which the legislators would not have adopted the bill.

> Where the Court is convinced that the bill contains a "single central remaining purpose", we will sever that portion of the bill containing the additional subject(s) and permit the bill to stand with its primary, core subject intact. In determining the original, controlling purpose of the bill for purposes of determining severance issues, a title that "clearly" expresses the bill's single subject is exceedingly important.

Hammerschmidt, 877 S.W.2d at 103 (citations, ellipses, and brackets in original omitted).

Here, as demonstrated in the opening brief, House Bill 1442 was the product of a logrolling session that left it studded with numerous sections unrelated to the original purpose of "city sales taxes." Furthermore, as demonstrated in the opening brief, the ultimate title of House Bill 1442, "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)], is so broad that it gives no guidance as to what might be in the bill. The ultimate title of House Bill 1442, does not, as *Hammerschmidt* requires, make it clear "beyond reasonable doubt" that the one, original subject is "clearly" expressed in the bill's title.

Thus the entire bill is unconstitutional and none of House Bill 1442's multiple subjects can be severed out and saved. Even if some part of House Bill 1442 could be viewed as the bill's "original, controlling purpose," the section at issue here, which provides a tax-exemption for internet travel companies and which was not added to the bill until almost the last minute, is not part of that original, controlling purpose, and thus cannot be saved by severance. *See Carmack v. Director, Missouri Dept. of Agriculture*, 945 S.W.2d 956, 961 (Mo. banc 1997) (following *Hammerschmidt*).

In short, the Resellers' arguments concerning severance fail to recognize the difference between cases where a bill's title is underinclusive and those where, as here, the bill's title is overinclusive:

> [W]here the title is underinclusive, the portions of the bill that fall outside the scope of the title may be invalidated and severed from the remainder of the bill. However, in a case of an overinclusive title such as this, the entire bill will normally be found invalid because the title's lack of notice as to the subject matter included in the bill applies to the bill as a whole.

Home Builders Assn of Greater St. Louis v. State, 75 S.W.3d 267, 272 (Mo. banc 2002) (citations omitted).

CONCLUSION

For the reasons stated herein and in the opening brief, Section 1 of House Bill 1442, subsequently codified at Section 67.662, RSMo. (2010), should be stricken as unconstitutional under the Missouri Constitution, the judgment below should be reversed, and the case remanded for further proceedings.

Respectfully submitted,

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

1. This Appellants' Reply Brief filed March 24, 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 6,742 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 have been served on the Attorney General of the State of Missouri and counsel of record for respondents March 23, 2011, by mailing the same by U.S. Mail, first-class postage prepaid, to (list on next page):

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