IN THE
SUPREME COURT OF MISSOURI

No. SC96862

CITY OF CHESTERFIELD, et al.,

Appellant,

v.

STATE OF MISSOURI, et al.,

Respondent.

Circuit Court of Cole County, Missouri
Case Number 14AC-CC00643
The Honorable Jon E. Beetem

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

The action is one involving the question of whether the County Sales Tax Law as set forth in Sections 66.600 and 66.620 RSMo., violates the Missouri Constitution's prohibitions on special laws embodied in Article III §40(21) and (30), and hence involves the constitutionality of laws of this State.

STATEMENT OF FACTS

In their Second Amended Petition ("Petition"), Plaintiffs City of Chesterfield, Missouri ("Chesterfield") and Bob Nation, the sitting Mayor, sought a judgment declaring Sections 66.600 (Appendix, A-16) through 66.630 RSMo (A-16) (the "County Sales Tax Law") unconstitutional because they violate the prohibition against special laws under the Missouri Constitution Article III, Sections 40(21) and (30). (LFApp.Doc.100) (A-53).

Parties

The City of Chesterfield is a municipal corporation and a city of the third class organized and existing pursuant to the laws of the State of Missouri, and located within St. Louis County, Missouri. (Id.at ¶1). The City of Chesterfield was incorporated on June 1, 1988, prior to which its territory was part of the unincorporated area of St. Louis County. (Id. at ¶2). Plaintiff Bob Nation is mayor of Chesterfield and has been a resident, registered voter and taxpayer of Chesterfield since its incorporation in 1988. (Id. at ¶¶ 3-4). Defendant John Mollenkamp was the Interim Director of Revenue of the State of Missouri at the time the Petition was filed and was sued in his official capacity. (Id. at ¶ 10).

Intervenor-Defendant St. Louis County, Missouri is a political subdivision of the State of Missouri, duly organized under a special charter in accordance with the provisions of Article VI, Section 18 of the Constitution of the State of Missouri. (LFApp.Doc.106 at ¶6). Intervenor-Defendants Florissant, Wildwood, University City and Webster Groves are municipalities located within St. Louis County, Missouri that are Group B (pool) cities for purposes of the County Sales Tax Law. (Id. at ¶7). Intervenor-Defendants Ballwin and Manchester are municipalities located within St. Louis County, Missouri that are A/B cities, meaning there are parts of these cities that are treated as Group A areas (point of sale) and other parts treated as Group B areas (pool) for purposes of distributing the sales taxes under the County Sales Tax Law. (Id. at ¶8).

History of the County Sales Tax Law

St. Louis County is an urban county without a dominant city within its boundaries. Today, approximately two-thirds of the population of St. Louis County live in municipalities that range in size from 13 to 52,158. The remaining one-third reside in the unincorporated areas. (Id. at ¶9). St. Louis County government provides services to the entire County, such as the civil, criminal and family courts, the election system, public health, regional parks, jail, and arterial roads. For the County residents who live in the unincorporated areas, St. Louis County government also provides

basic municipal services, such as police services, street department, and planning and zoning. (Id. at ¶10).

In the early 1900s the City of St. Louis ("City") had a population of 700,000 and an additional 100,000 people lived in St. Louis County with fourteen municipalities, most of them small. By 1950, the City population had reached a maximum of 800,000 residents, the County population had reached 400,000, and the number of municipalities had increased to 81. (Id. at ¶11). After 1950, the population of the City declined and the St. Louis County population increased. 1960 marked the point at which the County began to exceed the City in the number of residents, reaching almost 1,000,000 by 1970. The City continued to decline in population. (Id. at ¶12).

St. Louis County adopted a new Charter in the early 1950s. (Id. at ¶13).

Prior to 1969, property and utility taxes were the principal sources of revenue for St. Louis County. Municipalities also had their own ad valorem taxes. In 1969, the Missouri Legislature authorized cities to adopt their own sales taxes of up to one percent on retail sales with voter approval. Sections 94.500 (A-42) through 94.550, RSMo (A-42) (Id. at ¶15).

Many cities in St. Louis County adopted the tax after the 1969 law was passed. This was especially true for municipalities in which shopping malls or other concentrated retail locations could potentially generate significant sales tax revenue for the city. A number of other cities had limited potential for sales tax revenue, due to the absence of significant retail activity. In St. Louis County, the municipalities collecting the local option sales tax retained the full amount collected. (Id. at ¶16).

Cities with lower per capita sales tax yield argued the system was unfair because their residents shopped at the retail centers in neighboring cities, yet all of the sales tax revenue went to the "point of sale" city. Other municipalities offered the counter argument that shopping areas generated additional costs and that retaining the sales tax revenue within the point of sale city was justified. (Id. at ¶17).

In 1977, the General Assembly passed the St. Louis County Sales Tax Law. The controlling statute, §66.600, RSMo, authorized the governing body of any county of the first class having a charter form of government and not containing a city with a population of four hundred thousand or more to adopt by ordinance a countywide sales tax on retail sales to benefit both the incorporated and unincorporated areas of that county. Such a tax would only become effective if approved by the voters

of the county. (Id. at ¶21). Only St. Louis County met the statutory definition.

The voters approved the tax on October 4, 1977. (Id. at ¶ 22).

Prior to passage of the countywide sales tax, 54 municipalities in St. Louis County had already adopted the one cent local option sales tax as authorized in 1969 by the City Sales Tax Act. (Id. at ¶ 23).

The passage to the St. Louis County Sales Tax Law nullified all of these municipal taxes. §66.600. (Id.).

Section 66.620. divided St. Louis County municipalities into two groups for purposes of distributing the taxes: "Group A" ("point-of-sale") and "Group B" (the "pool"). Group A consisted of those cities that had enacted the local option sales tax prior to adoption of the County Sales Tax Law. Group B consisted of those municipalities that had not enacted the local option sales tax (pool cities) plus the entire area of unincorporated St. Louis County. (Id. at ¶ 24).

The new countywide sales tax increased the total amount of sales tax collected in St. Louis County, largely because St. Louis County had its own sales tax. (Id. at ¶27).

Because many of the beneficiary cities were located in less affluent areas of the County, the pool monies (those contributed by the Group B

cities and the unincorporated areas) being distributed per capita allowed these cities to expand and strengthen their services. (Id. at ¶28). However, a number of pool cities continued to believe that the significant difference in per capita yield between the pool and many of the point of sale cities was too large and, therefore, unfair. (Id. at ¶ 29).

In 1977, St. Louis County and Jackson County were the only first class counties that adopted a charter form of government. (LFApp.Doc 111 at ¶19).

1983 Issues and Resolution

The 1980 Census highlighted some of perceived differences between pool and point of sale cities. Many of the inner ring pool cities declined in population and began to receive less sales tax. The late 1970s and early 1980s were also characterized by high inflation, which drove up the cost of service delivery. Many municipalities were experiencing fiscal stress. (LFApp.Doc. 106 at ¶30).

In 1983, the Missouri Supreme Court changes the law of annexation in Missouri. *City of Town & Country v. St. Louis County,* 657 S.W. 2d 598 (Mo.1983), permitting he City of Town and Country to annex adjoining land without the concurrence of St. Louis County government. (Id. at ¶32).

Mayors of cities across St. Louis County that abutted unincorporated areas with retail centers began to examine annexation possibilities. Leaders in some cities, Creve Coeur and Overland for example, began to consider annexation of retail centers, such as West Port Plaza, located in the unincorporated areas. Sales taxes from such centers were in the pool, but if the area was annexed by a point of sale Group A city, less tax revenue would end up in the pool. There were also discussions at this time about the incorporation of new cities in unincorporated areas of West County and South County. (Id. at ¶33).

The General Assembly amended Section 66.620 of the County Sales Tax Law in 1984. (Id. at¶37).

Senator Schneider from Florissant was the sponsor of the bill in the Senate. He had supported legislation for a countywide per capita distribution but agreed to support a compromise proposal from the St. Louis County Municipal League to deal with what was perceived to be an immediate problem, namely, pending annexation proposals on the April 1984 ballot. (Id. at ¶38).

With any annexation or new incorporation, the B Group -- consisting of St. Louis County and the pool cities -- would experience a loss of sales tax revenue because the population and amount of taxes collected within

the unincorporated area declines with annexations and incorporations, thus reducing the per capita share of the sales tax pool funds. (Id. at ¶39). County government leaders also feared that piecemeal annexations and incorporations would leave the County municipal service system with isolated islands of residents and inadequate revenue sources and population concentrations for efficient service delivery. For B cities, the annual per capita sales tax revenue would also decline as the size of the pool declined. It was likely that the revenues in the pool would shrink faster than the actual population decline because areas most likely to be annexed or incorporated would contain significant retail activity. For B cities faced with a smaller share of the pool because of population loss, this would be a double blow. The 1984 legislation attempted to address these concerns. (Id. at ¶40).

Voters in the areas to be annexed defeated four of the five 1984 annexation proposals on the ballot. The only pending incorporation, Maryland Heights, became final in the summer of 1985 and included the West Port Plaza shopping and office center. (Id. at ¶41).

One of the consequences of the debate over annexation and new incorporations, however, was a renewed dissatisfaction on the part of B cities and St. Louis County with the existing distribution system. Thus, the sales tax debate continued after the 1984 legislation, even though the

legislation prevented the Group B area from being reduced any further. (Id. at ¶42).

In 1991, Buzz Westfall was elected St. Louis County Executive. In December 1992, Westfall offered a proposal that would have, over time, significantly changed the sales tax distribution and move the County closer to a per capita distribution pool system. (Id. at ¶43).

1993 Westfall Sales Tax Plan

The Westfall Plan sought to place a cap on per capita sales tax receipts for A cities at two times the countywide average for the base year over a three-year phase-in period. The surplus would be distributed to the pool. With voter approval, cities could enact an additional quarter cent sales tax to partially offset the loss. It was anticipated that with inflation, most point of sale cities would over time collect less from the one-cent tax than the per capita pool city payment with the expanded pool. Thus, the system would eventually become mostly a per capita pool system. (Id. at ¶44).

Westfall's plan was introduced in the Missouri legislature in January 1993. The A cities' counter proposal featured a return to all cities as point of sale with a sliding scale formula in which cities above the countywide average would share with cities below the average. The unincorporated

County would become point of sale. This plan also featured authorization for a quarter cent sales tax with voter approval. Part of this tax would also be shared by high sales tax yield cities. Public debate and private negotiations led to a compromise plan that was supported by most cities (including Chesterfield) and the Westfall administration. (Id. at ¶45). Under the mutually agreed proposal, A cities above the countywide average would share a portion of their sales tax with the pool based on a sliding scale. For most cities, sharing would be in the range of 7.5% to 25%. An optional quarter cent sales tax was available to all cities with voter approval and a different sliding scale sharing formula was adopted by the legislature for this tax. (Id.).

The compromise legislation was passed by the General Assembly in the 1993 session, and the new distribution system was phased-in over a three-year period. (Id. at ¶46). By the year 2000, approximately 18% of the total point of sale yield on the one cent countywide sales tax was being shared with the pool. This increased sales tax revenue for B cities and the County. (Id.).

The legislature made two other minor changes to the County Sales Tax Law in 1993/1994 that operated to preserve the B Group areas, furthering the action that had been taken in 1984. First, in 1993, the legislature eliminated the opportunity for an A city to move to B and, one

time only, move back to A. Second, after 1994, if an A city and a B city were to consolidate, the B portion of the consolidated city remained part of the pool and the A area remained point- of-sale, very much like the annexation scenario. These changes also ensured the B Group area would not shrink while providing predictability in terms of anticipated tax revenues based on the new distribution system. (Id. at ¶47).

The 1993 compromise legislation was the last major adjustment to the St Louis County Sales Tax Law distribution system until 2016 when the Legislature repealed and re-enacted §66.620. (Id. at ¶48).

The sharing agreement opened the door in the 1990s to other targeted local sales tax authorizations. The legislature subsequently authorized local sales taxes for capital improvements, park and storm water, and fire protection. In 2005, a half-cent sales tax for economic development was also authorized. Only the capital improvement sales tax is subject to a sharing provision. (Id. at ¶49).

Shifts in the locus of sales tax generation have taken place in the area over the two decades since the enactment of the 1993 legislation. Malls have closed, and new retail centers developed, as population shifts have occurred. More intensive retail development in St. Charles County and the growth of online sales has impacted the sales tax generated in St.

Louis County. A few cities have opted to shift from point of sale to pool status. But, the fundamental features of the sharing system first adopted in 1977, and legislatively modified in 1984 and 1993, remain in place today. (Id. at ¶50). [1]

Profile of the City of Chesterfield

The City of Chesterfield is located on the western edge of St. Louis County. The City occupies a land area of 32 square miles. (Id. at ¶53). The City of Chesterfield has a population of 47,777 and a high median income of $99,945. (Id. at ¶54).

Having made a dramatic comeback from the Flood of 1993, the Chesterfield Valley, located in the City of Chesterfield's western corridor, adjacent to Interstate I-64, has expanded significantly over the past 20 years with additional retail, office, hotels, light industrial and warehouse facilities. (Id. at ¶55).

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[1] County Sales Tax Law was again amended in 2016 (HCS HB 1561 "HB 1561"), which went into effect on August 28, 2016. HB 1561 contains changes to the distribution formula but does not otherwise change the County Sales Tax Law, including the classification of cities into Group A and Group B. (Petition ¶¶ 44-45).

Businesses in the Chesterfield Valley comprise 44% of licensed businesses in Chesterfield. (Id. at ¶56). Chesterfield Commons, located in the Chesterfield Valley, contains 2 million square feet of retail space. (Id. at ¶57). Two outlet centers opened in August 2013 adding 700,000 square feet of retail space and nearly 150 new stores. (Id. at ¶58). Shoppers are now visiting Chesterfield from a 150-mile radius. (Id. at ¶59). Major retail outlets in the City of Chesterfield include St. Louis Premium Outlets, Taubman Prestige Outlets, Chesterfield Mall, and Chesterfield Commons. (Id. at ¶60).

The St. Louis County Department of Transportation maintains the St. Louis County road and bridge system, which includes designated arterial roads and bridges in the City of Chesterfield. (Id. at ¶61). The arterial roads and bridges maintained by St. Louis County, along with Interstate I-64, connect shoppers to the major retail outlets in the City of Chesterfield. (Id. at ¶62).

Previous Litigation Involving the County Sales Tax Law

Chesterfield I

Chesterfield was incorporated in 1988, and at all times thereafter has been a pool or "Group B" city under the County Sales Tax Law. (LFApp.Doc.100 at ¶¶ 2, 6). On January 17, 1990, Chesterfield applied to

the Missouri Director of Revenue ("Director") to become a "Group A" city for purposes of the County Sales Tax Law. (Id. at ¶63).

On February 5, 1990, the Director denied the request. (AHC Decision at ¶3). Chesterfield then filed a complaint with the Administrative Hearing Commission ("AHC") on March 1, 1990. (Id. at ¶64).

Chesterfield and the Director filed a stipulation of facts with the AHC. (Id. at ¶66). Chesterfield contended that "pursuant to [Section 66.620.2 of the County Sales Tax Law] Group B cities are arbitrarily established." (Id. at ¶67).

Chesterfield further contended that, as a result of Section 66.620.3 RSMo, "it is forced to remain a 'Group B' city which arbitrary (sic) and unreasonably discriminates against citizens of the City of Chesterfield in that they are not given the same rights as others (sic) citizens within St. Louis County to decide for themselves the manner and nature of the distribution of sales tax revenues collected within their city limits in violation of their constitutional rights under Article 1 Section 2 of the Missouri Constitution." (Id. at ¶68).

Chesterfield further contended that the decision of the Missouri Department of Revenue denying Chesterfield the opportunity to become an "A" city thus denies the citizens their equal rights as all other "A"

citizens and they are denied equal protection under the law. (Id. at ¶69). Chesterfield further contended that because the controlling state statute is unconstitutional, the Director should allow Chesterfield the choice of becoming a "Group A" point of sale city. (Id. at ¶70).

Chesterfield argued before the AHC that the city classification scheme of the County Sales Tax Law violates the equal protection clauses and due process clauses of the United States Constitution and Missouri Constitution. (Id. at ¶71). The AHC decided that it did not have jurisdiction to disregard §66.620 of the County Sales Tax Law and, therefore, denied Chesterfield's application. (Id. at ¶72).

Chesterfield filed a Petition for Review of the AHC Decision. (Id. at ¶73). In its Petition for Review, Chesterfield sought reversal of the AHC Decision and a declaration that Section 66.620 RSMo is unconstitutional. (LFApp.Doc 100 at ¶4).

The Supreme Court affirmed the decision of the AHC. *City of Chesterfield v. Director of Revenue*, 811 S.W. 2d 375 (Mo. 1991). In particular, the Supreme Court held that (a) Chesterfield did not have standing to invoke due process or equal protection provisions of the state and federal constitutions and (b) it failed to preserve its claim that the County Sales Tax Law violated the state constitution by creating

subclasses of municipalities within the same class. (LFApp.Doc 106 at ¶75).

Berry

In 1993, the General Assembly revised the distribution formula in the County Sales Tax Law by passing H.B. 618. "The revision, in effect, shifted a larger portion of the sales tax revenue from Group A to Group B municipalities and to St. Louis County." *Berry v. State*, 908 S.W. 2d 682, 683 (Mo.1995). (Id. at ¶76).

After a number of Group A cities filed suit to challenge the constitutionality of H.B. 618, Chesterfield and six other Group B cities ("City -Intervenors") filed a motion to intervene as defendants. (Id. at ¶77).

The Circuit Court of Cole County granted Chesterfield's motion to intervene, effective nunc pro tunc, as of August 1, 1994 when the Court orally sustained the motion. (Id. at ¶80).

In their Answer to the Amended Joint Petition in *Berry*, the City-Intervenors prayed, inter alia, for a declaration "that H.B. 618 and Sections 66.600 to 66.620 and Section 144.748 RSMo are valid and constitutional and in full force and effect." (Id. at ¶81).

The Circuit Court granted summary judgment in favor of the City-Intervenors and the other Defendants, and decreed that:

House Substitute for House Bill 618, 87th General Assembly, First regular Session ("HSHB 618") is constitutional and valid as against all of the challenges raised by Plaintiff's and more particularly:

1. HSHB 618 is constitutional and valid under Article VI, §§ 8, 15, 16 and 23 and under Article X, §§ 1, 2, 3 and 16-22 of the Missouri Constitution.
2. HSHB 618 is consistent with the voter approval of 1977.
3. The St. Louis County sales tax ordinance and the sales tax are valid and in full force and effect throughout St. Louis County.

(Id. at ¶82).

The Supreme Court affirmed summary judgment in favor of the City-Intervenors. *Berry v. State*, 908 S.W. 2d 682 (Mo. 1995). (Id. at ¶83).

St. Charles County and Jefferson County

In 1992, St. Charles County adopted a charter form of government, becoming a first class charter county. (LFApp.Doc 111 at ¶22). St. Charles County's population in the 1990 U.S. Census was 212,907. (Id. at ¶23). St. Charles County had a population less than half of 900,000 in the 2000 and 2010 census. (Id. at ¶24).

POINTS RELIED ON

I.

The Trial Court Erred In Ruling That Counts I-IV Of The City Of Chesterfield's Petition Were Barred By Res Judicata *Because* Res Judicata Does Not Apply To The City's Claims *In That* The Judgment Upon Which The Trial Court Relied Was Not A Judgment On The Merits And Did Not Address The Issues Raised In Counts I-IV.

Healthcare Services of the Ozarks, Inc., v. Copeland, 198 S.W.3d 604 (Mo.2006)

Twehous Excavating Co., Inc. v. L.L. Lewis Investments, L.L.C., 295 S.W.3d 542 (Mo. App. W.D. 2009)

Jefferson County Fire Protection Districts Ass'n, 205 S.W.3d 866 (Mo. 2006)

State ex rel. Rothermich v. Gallagher, 816 S.W.2d 194(Mo.1991)

II.

The Trial Court Erred In Ruling That Counts I-IV Of The City Of Chesterfield's Petition Were Barred By Various Estoppel Doctrines *Because* Estoppel Does Not Apply To The City's Claims *In That* The Judgment And Cases Upon Which The Trial Court Relied Were Either Not A Judgment On The Merits, Did Not Address The Issues Raised In Counts I-IV, Or The Product Of Superseded Judicial Decisions.

Sotirescu v. Sotirescu, 52 S.W.3d 1, 4 (Mo.App.E.D. 2001)

Vinson v. Vinson, 243 S.W.3d 418 (Mo.App.E.D.2007)

Imler v. First Bank of Missouri, 451 S.W.3d 282 (Mo.App.W.D. 2014)

Brown v. State Farm Mut. Auto. Ins. Co., 776 S.W.2d 384, 389 (Mo. 1989)

Section 66.620 RSMo.

Missouri Constitution Article III, § 40(21)

Missouri Constitution Article III, § 40(30)

III.

The Trial Court Erred In Ruling That Counts I-IV Of The City Of Chesterfield's Petition Were Barred By Laches *Because* Laches Does Not Apply To The City's Claims *In That* Chesterfield Is Not Seeking To Void The St. Louis County Sales Tax Law Ab Initio But Only Prospectively And Chesterfield Amended Its Petition Promptly After The Legislature Amended The St. Louis County Sales Tax Law.

Jefferson County Fire Protection Districts Ass'n, 205 S.W.3d 866 (Mo. 2006)

Metropolitan St. Louis Sewer Dist. v. Zykan, 495 S.W.2d 643 (Mo.1973)

McQueen v. Gadberry, 507 S.W.3d 127 (Mo.App.E.D. 2016)

Section 66.620 RSMo.

IV.

The Trial Court Erred In Concluding That The Closed-Ended Classifications Of Municipalities In The St. Louis County Sales Tax Law Do Not Violate Mo. Const. Art. III, §40 (30) *Because* § 66.620 Is A Special Laws *In That* The Statutes Place St. Louis County Municipalities Within Immutable Categories Based On Historical Facts And There Is No Substantial Justification For Making These Laws Special Rather Than General.

Bd. of Educ. of City of St. Louis v. Missouri State Bd. of Educ., 271 S.W.3d 1 (Mo. 2008)

City of Springfield v. Sprint Spectrum, L.P., 203 S.W.3d 177 (Mo. 2006)

Tillis v. City of Branson, 945 S.W.2d 447, 449 (Mo. 1997)

State ex rel. City of Blue Springs v. Rice, 853 S.W.2d 918 (Mo.1993)

Section 66.600 RSMo.

Section 66.620 RSMo.

Missouri Constitution Article III, § 40(30)

V.

The Trial Court Erred In Concluding That The St. Louis County Sales Tax Law Does Not Violate Mo. Const. Art. III, §40 (30) *Because* § 66.600 Is A Special Law *In That* The General Assembly Changed the Classification Definition to Assure that St. Charles County, Which Would Have Been Eligible For §66.600 Status, Would Not Become Eligible For That Status And This Is Undeniable Proof That The Law Is A Special Law And That A General Law Could Be Made Applicable.

Jefferson County Fire Protection Districts Ass'n, 205 S.W.3d 866 (Mo. 2006)

City of Normandy v. Greitens, 518 S.W.3d 183 (Mo. 2017)

School District of Riverview Gardens v. St. Louis County, 816 S.W.2d 219 (Mo.1991)

State ex rel. Rothermich v. Gallagher, 816 S.W.2d 194 (Mo.1991)

Section 1.120 RSMo.

Section 1.140 RSMo.

Section 66.600 RSMo.

Section 67.505 RSMo.

VI.

The Trial Court Erred In Finding That §§66.600 And 66.620 Do Not Violate Art. III, §40(21) *Because* §§ 66.600 And .620 Is A Special Law Regulating The Affairs Of St. Louis County *In That* §66.620 Appropriates Only St. Louis County General Revenues And The Appropriation Of County Funds Is An Affair Of St. Louis County Within The Meaning Of §40(21).

State ex rel. Bucker v. McElroy, 274 S.W. 749 (Mo. 1925)

State ex rel. Reynolds v. Jost, 175 S.W. 591(Mo. 1915)

Harrisburg Sch. Dist. v. Hickok, 761 A.2d 1132 (Pa.2000)

Rodriguez v. Gonzales, 227 S.W.2d 791 (Tx.1950)

Missouri Constitution Article IV, § 53 (1875)

ARGUMENT

I.

The Trial Court Erred In Ruling That Counts I-IV Of The City Of Chesterfield's Petition Were Barred By Res Judicata *Because* Res Judicata Does Not Apply To The City's Claims *In That* The Judgment Upon Which The Trial Court Relied Was Not A Judgment On The Merits And Did Not Address The Issues Raised In Counts I-IV.

Standard of Review

Here, the Court reviews summary judgment. Review is *de novo*. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo.1993). No deference is due the trial court judgment. *Id.*

A. The Trial Court's Judgment

The trial court based its res judicata ruling on two cases. *Chesterfield v. Director of Revenue*, 811 S.W.2d 375 (Mo.1991)("*Chesterfield I*") and *Berry v. State of Missouri*, 908 S.W.2d 682 (Mo.1995).

B. Res Judicata Applies only to Judgments on the Merits of the Issues Actually Decided in the Case

"Res judicata prevents a party from relitigating facts or questions that have been settled *by judgments on the merits* in a previous action." *Healthcare Services of the Ozarks, Inc., v. Copeland*, 198 S.W.3d 604, 612 (Mo.2006)(emphasis added).

"If a party lacks standing, the court must dismiss the case because it does not have jurisdiction of the substantive issues presented… [citation omitted]. Because standing is jurisdictional in nature, a dismissal for lack of standing is not 'on the merits' for res judicata purposes." *Id.*

Where the underlying judgment is based on a lack of standing, a trial court errs when it concludes that res judicata applies to a subsequent case to bar merits consideration of those issues. *Id.*

C. *Chesterfield I* was not Decided on the Merits and Cannot have Preclusive Effect Here

"As intriguing as [the questions presented] may be, the answers must await another day." *Chesterfield I*, 811 S.W.2d at 377.

In *Chesterfield I,* the City **first** asserted that §66.620 RSMo (1987)[2] violated due process and equal protection. The Court held that a municipality is not a person "within the protection of the due process and equal protection clauses of the United States Constitution." *Id.* *Flast v. Cohen*, 392 U.S. 83, 101 (1968) required a personal stake in the controversy as a condition to standing. Because the City "fails to meet the standing test as described in *Flast, id,* the Court concludes that the City lacks standing to invoke due process or equal protection provisions of the state and federal constitutions…." *Chesterfield I,* 811 S.W.2d at 378.

The City **second** asserted that §66.620 violated article VI, § 15 of the Missouri Constitution[3] in *Chesterfield I.* Here again, the Court dismissed the appeal on procedural, not substantive, grounds. "The general rule is that constitutional questions are deemed waived that are not raised at the first opportunity consistent with good pleading and orderly procedure." *Id.* at 378. Because "[t]he first mention of Missouri Constitution article VI, §

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[2] The statute has since been amended four times, with the latest amendment effective August 28, 2016.

[3] Ironically, several Group A cities raised an Art. VI, §15 challenge in *Berry v. State*, 908 S.W.2d 682 (Mo.1995). See Point II and Point VI, *infra*.

15 is in the appellant's brief," *id*, the City "has failed to preserve its claim that §66.620 violates article VI, §15 of the Missouri Constitution." *Id.*

Under the teaching of *Copeland*, *Chesterfield I* cannot operate to bar the City's claims here.

D. The Amendments to §66.620 Created New Rights/Obligations in Chesterfield

Section 66.620 was repealed and re-enacted with significant differences in 2016. Section 66.620 retained the pre-amendment distribution methodology, but it enacted additional provisions for calendar years where county tax revenues are greater than they were in 2014. *See* Sec. 66.620.5, RSMo. These additional provisions went into effect January 1, 2017. *See* Sec. 66.620.6, RSMo. Because the statute was repealed and reenacted in 2016, the language of the statute was "unknown or yet-to-occur at the time of the first action." *Twehous Excavating Co., Inc. v. L.L. Lewis Investments, L.L.C.*, 295 S.W.3d 542, 547 (Mo. App. 2009)

Moreover, the amendment to § 66.620 creates new rights/obligations which were not in existence at the time of the judgment in the earlier actions, and Chesterfield could not have brought this particular claim in the earlier action even exercising reasonable diligence. *See Reed v. City of Springfield*, 758 S.W.2d 138, 149 (Mo. App. 1988); *see also Dragna v. Auto Owner's Mutual Ins. Co.*, 687 S.W.2d 277, 279 (Mo. App. 1985)(finding the

effect of a statutory amendment was to create new rights). Plaintiffs promptly amended their petition to contend that the newly revised law is an unconstitutional special law. (LFApp.Doc100).

E. The Court's 2006 Changed Standard to Adjudicate Article III, § 40 (30) Claims Prevents Application of Res Judicata Because the Claims Could Not have been Advanced until the Legislative Amendments to §66.620 in 2016.

Res judicata is also inapplicable here because the Court changed the standard in 2006 regarding whether population-based classifications rendered a statute a special law. *Jefferson County Fire Protection Districts Ass'n*, 205 S.W.3d 866, 870-87 (Mo. 2006). Under the old standard, classifications based on population enjoyed a presumption that they were valid. Although Section 66.620 does not itself classify political subdivisions based on population, Section 66.620 must be read *in pari materia* with Section 66.600 as though they constitute one act. *McQueen v. Gadberry*, 507 S.W.3d 127, 139 (Mo.App. 2016) ("Pursuant to the doctrine of *in pari materia*, consistent statutes relating to the same subject matter are to be construed together as though they constitute one act, and we presume the statutes were intended to be read harmoniously.")

Section 66.600 does contain population-based classifications, which would have enjoyed a presumption of validity under the old standard in

place at the time of the earlier action, essentially foreclosing any claim by Chesterfield that Section 66.620 was a special law on that grounds. The new standard established in *Jefferson County* gives Chesterfield legal recourse with regard to this claim that did not exist at the time of the previous case. "All consistent statutes relating to the same subject are *in pari materia* and are construed together as though constituting one act, whether adopted at different dates or separated by long or short intervals." *State ex rel. Rothermich v. Gallagher*, 816 S.W.2d 194, 200 (Mo.1991). Further, "[R]es judicata extends only to the facts in issue as they existed at the time the judgment was rendered, and does not prevent a reexamination of the same questions between the same parties where in the interval the facts have changed or new facts have occurred which may alter the legal rights of relations of litigants." *City of Hardin v. Norborne Land Drainage Dist.*, 232 S.W.2d 921, 925 (Mo. 1950).

Conclusion

The trial court erred in applying res judicata to the City's claims based on *Chesterfield I.*

II.

The Trial Court Erred In Ruling That Counts I-IV Of The City Of Chesterfield's Petition Were Barred By Various Estoppel Doctrines *Because* Estoppel Does Not Apply To The City's Claims *In That* The Judgment And Cases Upon Which The Trial Court Relied Were Either Not A Judgment On The Merits, Did Not Address The Issues Raised In Counts I-IV, Or The Product Of Superseded Judicial Decisions.

Standard of Review

The Court here reviews summary judgment. Review is *de novo*. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. 1993). No deference is due the trial court judgment. *Id.*

A. The Trial Court's Ruling

The trial court concluded that "Chesterfield's claims are also barred by judicial estoppel and collateral estoppel based on Chesterfield's litigation in *Berry [v. State*, 908 S.W.2d 682 (Mo.1995)]" and "Chesterfield's current challenges to the Law are barred by judicial estoppel and equitable estoppel." (LFApp.Doc.176-5; 176-9).

In essence, the trial court's ruling depends on this "logical/legal" progression being true: An intervenor in a suit attempting to uphold the constitutionality of a statute must also assert any claims that the intervenor has that the statute is unconstitutional in that same suit. If the intervenor fails to do so, that party may not later attack the same statute on different constitutional grounds because of collateral estoppel.

This conclusion is legally and logically untenable.

B. Collateral Estoppel Deals with Issue Preclusion

Res judicata is comprised of two separate and distinct doctrines: issue preclusion, known as collateral estoppel and claim preclusion, known as res judicata. *Wolfe v. Central Mine Equipment Co.*, 895 S.W.2d 83, 87 (Mo.App. E.D.1995). In determining whether a claim is barred by collateral estoppel, or issue preclusion, we consider four factors: 1) whether the issue decided in the prior adjudication was identical with the issue presented in the present action; 2) whether the prior adjudication resulted in a judgment on the merits; 3) whether the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication; and 4) whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior

suit. *Meckfessel v. Fred Weber, Inc.,* 901 S.W.2d 335, 339 (Mo.App. E.D.1995).

Sotirescu v. Sotirescu, 52 S.W.3d 1, 4 (Mo. App. E.D. 2001). *Accord*, *King Gen. Contractors, Inc. v. Reorganized Church of Jesus Christ of Latter Day Saints*, 821 S.W.2d 495, 501 (Mo. 1991). Thus, collateral estoppel applies only where the issue actually decided by the court was "necessarily and unambiguously decided" in the previous case.

C. *Berry* did not Address the Issues Raised Here

Berry arose when a number of Group A cities and individual taxpayer residents filed a declaratory judgment action seeking a declaration that the 1993 amendments to the County Sales Tax Law, which established the new distribution formula, were unconstitutional. As a Group B city, Chesterfield was not a plaintiff or defendant in the case. The Group A cities asserted that the County Sales Tax Law violated these Missouri constitutional provisions:

Article VI, §8

Article VI, §15

Article X, §1.

Article X, §2

Article X, §3

Article X, §16

Article X, §21

Article X, §22.

Notably absent is the claim asserted by Chesterfield here – that §66.620, as passed in 2016, violated Mo. Const. Art. III, § 40 (21) and Art. III, §40 (30).

In *Berry*, Chesterfield joined with other Group B cities and St. Louis County as intervenors in order to defend the County Sales Tax Law against the asserted constitutional challenges. (LFApp.Doc107-9). The Circuit Court of Cole County granted summary judgment against the Group A cities as follows:

> [The 1993 amendments to the St. Louis County Sales Tax Law] are constitutional and valid as against all of the challenges raised by Plaintiff's and more particularly: The Law is constitutional and valid under Article VI, §§ 8, 15, 16 and 23 and under Article X, §§ 1, 2, 3 and 16-22 of the Missouri Constitution.…

Id. Again, notably absent is any ruling that addressed application of Mo. Const. Art. III, § 40 (21) and/or Art. III, §40 (30) to §66.620.

On appeal, the Court rejected all of the claims of the Group A cities and affirmed the judgment of the Circuit Court.

The issues "necessarily and unambiguously decided" in *Berry* did not include a claim that the St. Louis County Sales Tax violated Art. III, §§ 40(21) and (30). The trial court's judgment misapplied the doctrine of collateral estoppel.

1. Judicial Estoppel Also Requires Identity on the Issue Decided that is Absent Here

Chesterfield I, as earlier noted, attacked the constitutionality of the St. Louis County Sales Tax Law on two grounds, one of which Chesterfield (a Group B city) advanced unsuccessfully there due to a procedural flaw. *Barry* involved an attack on the constitutionality of that law by Group A cities, on multiple grounds, none of which asserted a violation of Art. III, §§40 (21) and (30). Chesterfield, together with other cities and St. Louis County, intervened in *Barry*, and argued that the St. Louis County Sales Tax Law did not violate the constitution on the grounds asserted by the Group A cities listed previously in this Point Relied On.

The trial court's conclusion that judicial estoppel applies because of *Barry* is misguided. Judicial estoppel requires three factors.

> First, a party's later position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept the party's earlier position.... A third consideration is whether the

> party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Vinson v. Vinson, 243 S.W.3d 418, 422 (Mo.App.E.D.2007), quoted with approval in *Imler v. First Bank of Missouri*, 451 S.W.3d 282, 292 (Mo.App.W.D. 2014).

The trial court's summary judgment order offered no analysis of the *Vinson/Imler* factors. Indeed, the trial court noted that "Chesterfield … challenged the constitutionality of the Law in *Chesterfield I* before successfully defending the Law in *Berry." (*LFApp.Doc107-9). The trial court seemed to believe that any argument by Chesterfield supporting the St. Louis County Sales Tax Law creates estoppel if a later argument is made attacking the Law on altogether different grounds – and ignores that as to some constitutional issues, Chesterfield has long held that the Law is unconstitutional. The second element of *Vinson* requires a decision by the trial court on the same issue before collateral estoppel will apply. That element is not met here, given that this case contains the §§40(21) and (30) issues that were never a part of *Berry*. The trial court's uncabined application of judicial estoppel finds no support in the law.

Judicial estoppel also turns on specific claims asserted and finally decided, not tangential arguments offered by a party unrelated to the

issues raised by a party opponent and decided by the court. Even assuming that Chesterfield made some statement supporting the constitutionality of the Law in *Berry* – and thus satisfied the first *Vinson/Imler* prong – it is beyond serious cavil that *Berry* does not meet the second prong. Chesterfield did *not* succeed in persuading the *Berry* trial court (or this Court) to rule that the St. Louis County Tax Law was not a special law. That issue was not presented or decided in *Berry*.

And as to the third element, St. Louis County and the cities defending the Law in this case have not changed their position. They have not suffered an unfair detriment – and Chesterfield has not gained an unfair advantage – because Chesterfield argued that the Law did not violate the specific constitutional provisions from which the *Berry* plaintiffs launched their attack.

The doctrine of judicial estoppel does not lie to foreclose Chesterfield's Art. III, §§ 40(21) & (30) claim.

2. Equitable Estoppel Also Requires Identity on the Issue Decided that is Absent Here.

At the heart of equitable estoppel is prejudicial detrimental reliance. "No … estoppel results … where no prejudice results to the claimant from reliance…." *Brown v. State Farm Mut. Auto. Ins. Co.*, 776 S.W.2d 384, 389 (Mo. 1989). Thus, the elements of equitable reliance require actual injury

– that is, more than the mere trouble and expense of litigation. *Brown*, 776 S.W.2d at 388.

> Equitable estoppel exists where there is
>
> an admission, statement, or act inconsistent with the claim afterwards asserted and sued upon, (2) action by the other party on the faith of such admission, statement, or act, and (3) injury to such other party, resulting from allowing the first party to contradict or repudiate the admission, statement, or act.

Id. at 386.

Again, the trial court attempted no analysis. Rather it mused that "voiding the County Sales Tax Law, or parts of it, would cause a major disruption in the fiscal affairs of St. Louis County." (LFApp.Doc107-9). This statement makes no mention of what act, statement or admission done or made by Chesterfield that the County, State, or any city relied on, and if relied on, resulted in actual injury. The most that Chesterfield could have done is assert that as to the issues raised in *Berry*, the Law did not violate the constitution. St. Louis County made the same argument, as did Chesterfield. There is simply no basis for a conclusion that any party changed its position – stopped following the statute or collecting sales tax

or following the statutory formula – in reliance on Chesterfield's arguments as to constitutional issues not involved in this litigation.

Conclusion

The trial court erred in applying estoppel of any sort to Chesterfield's claims here.

III.

The Trial Court Erred In Ruling That Counts I-IV Of The City Of Chesterfield's Petition Were Barred By Laches *Because* Laches Does Not Apply To The City's Claims *In That* Chesterfield Is Not Seeking To Void The St. Louis County Sales Tax Law Ab Initio But Only Prospectively And Chesterfield Amended Its Petition Promptly After The Legislature Amended The St. Louis County Sales Tax Law.

Standard of Review

The Court here reviews summary judgment. Review is *de novo*. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. 1993). No deference is due the trial court judgment. *Id.*

A. The Trial Court's Ruling

The trial court concluded that

> Chesterfield's claims are also barred by laches. Chesterfield could have raised these claims in 1988 but did not, and has instead accepted millions of dollars under the statute it now challenges. This works to the disadvantage and prejudice of St. Louis County and the Group B cities that relied on the County Sales Tax Law when they promoted commercial development

within their boundaries, issued revenue bonds, and made other financial commitments and fiscal decisions.

(LFApp.Doc.176-10). The trial court cited *State ex rel. City of Monett v. Lawrence Cty.*, 407 S.W.3d 635, 640–41 (Mo.App.S.D. 2013) as authority for its laches ruling.

B. *Monett* Involved a County's Unilateral Decision to Stop Collecting Taxes and a Subsequent Attempt to void TIF bonds *ab initio*.

Monett's teaching does not apply in this case. There, Lawrence County stopped allocating TIF moneys in 2009, more than a decade after the 1996 formation of the TIF district and after the County had been allocating, and Monett had been using the revenues to pay its TIF bonds, for those 13 years. The effect of the County's claims was to require a rewinding of the entire TIF project. The Court applied estoppel, not laches to avoid "disrupt[ing] settled expectations years after" an alleged violation." *Monett*, 407 S.W.3d at 641.

This is an action at law, seeking a declaratory judgment. It does not seek damages, reimbursement for past constitutional violations or retrospective application of a decision of unconstitutionality. That alone separates this case from *Monett.*

Monett does not apply for a **second** reason. Section 66.620 was repealed and re-enacted with significant differences in 2016. Section 66.620 retained the pre-amendment distribution methodology, but it enacted additional provisions for calendar years where county tax revenues are greater than they were in 2014. *See* Sec. 66.620.5, RSMo. These additional provisions went into effect January 1, 2017. *See* Sec. 66.620.6, RSMo. Because the statute was repealed and reenacted in 2016, the language of the statute was "unknown or yet-to-occur at the time of the first action." *Twehous Excavating Co., Inc. v. L.L. Lewis Investments, L.L.C.*, 295 S.W.3d 542, 547 (Mo. App.W.D.2009).

Moreover, the amendment to Section 66.620 creates new rights which were not in existence at the time of the judgment in the earlier action, and Chesterfield could not have brought this claim in the earlier action even exercising reasonable diligence. *See Reed v. City of Springfield*, 758 S.W.2d 138, 149 (Mo. App.S.D.1988); *see also Dragna v. Auto Owner's Mutual Ins. Co.*, 687 S.W.2d 277, 279 (Mo. App.W.D.1985) (finding the effect of a statutory amendment was to create new rights). Plaintiffs promptly amended their petition to contend that the newly revised law is an unconstitutional special law. (LFApp.Doc100).

Third, the St. Louis County Sales Tax Law has been the subject of significant constitutional challenges since its initial passage. The Court

has decided two of those cases – each brought on grounds different from those Chesterfield brought in this case.

Laches is the neglect for an unreasonable and unexplained length of time, under circumstances permitting diligence, to do what in law should have been done. *In re Estate of Remmele,* 853 S.W.2d 476, 480 (Mo.App.W.D.1993) (citing *Metropolitan St. Louis Sewer Dist. v. Zykan,* 495 S.W.2d 643, 656–57 (Mo.1973)). Mere delay in asserting a right does not of itself constitute laches; the delay involved must work to the disadvantage and prejudice of the defendant. *Id.* No reasonable person would not have been on notice that cities from every camp had historically asserted, and would likely continue to assert, constitutional claims against the Law if the opportunity presented itself through a new law or a change in the Court's understanding of the constitutional standard. Both occurred here. No party changed its position in reliance on any assurance of quietude from Chesterfield on the constitutional front as to this unconstitutional law.

C. The Court's 2006 Changed Standard to Adjudicate Article III, § 40(30) Claims Prevents Application of Res Judicata Because the City's Claims Could Not have been Advanced until the Legislative Amendments to §66.620 in 2016.

Laches is also inapplicable here because the Court changed the standard regarding whether population-based classifications rendered a statute a special law in 2006. *Jefferson County Fire Protection Districts Ass'n*, 205 S.W.3d at 870-87. Under the old standard, classifications based on population enjoyed a presumption that they were valid. Although Section 66.620 does not itself reclassify political subdivisions based on population, Section 66.620 must be read *in pari materia* with Section 66.600 as though they constitute one act. *McQueen v. Gadberry*, 507 S.W.3d 127, 139 (Mo.App.E.D. 2016) ("Pursuant to the doctrine of *in pari materia*, consistent statutes relating to the same subject matter are to be construed together as though they constitute one act, and we presume the statutes were intended to be read harmoniously.")

Section 66.600 does contain population-based classifications, which would have enjoyed a presumption of validity under the old standard in place at the time of the earlier action, essentially foreclosing any claim by Chesterfield that Section 66.620 was a special law on that ground. The new standard established in *Jefferson County* gives Chesterfield legal

recourse with regard to this claim that did not exist at the time of the previous case. "All consistent statutes relating to the same subject are *in pari materia* and are construed together as though constituting one act, whether adopted at different dates or separated by long or short intervals." *State ex rel. Rothermich v. Gallagher*, 816 S.W.2d 194, 200 (Mo. 1991). Further, laches, like res judicata "extends only to the facts in issue as they existed at the time the judgment was rendered, and does not prevent a reexamination of the same questions between the same parties where in the interval the facts have changed or new facts have occurred which may alter the legal rights of relations of litigants." *City of Hardin v. Norborne Land Drainage Dist.*, 232 S.W.2d 921, 925 (Mo. 1950).

D. Laches is Reserved for Cases in Equity

This is a declaratory judgment action. It is not a case in equity.

The doctrine of laches is the equitable counterpart of the statute of limitation defense. Its purpose is to avoid unfairness which can result from the prosecution of stale claims. Mere delay does not constitute laches. *Higgins v. McElwee, et al.,* 680 S.W.2d 335, 341 [6–9] (Mo.App.E.D.1984). Rather, the delay must be unreasonable, unexplained and must be shown to have caused damage and prejudice. *Id.* In some ways, then, laches is simply estoppel in another form, based not on acts of a party (as estoppel might be) but on failures to act.

> When laches does not amount to estoppel or waiver, it does not ordinarily bar legal claims, only equitable remedies .... Courts have routinely referred to laches as an equitable defense, that is, a defense to equitable remedies but not a defense available to bar a claim of legal relief.

1 Dan B. Dobbs, Law of Remedies: Damages--Equity--Restitution 103, 105-06.

As Professor Dobbs makes clear, and as with estoppel, there must be damage or prejudice before laches will be permitted in an equity matter. Again, "[m]ere delay in asserting a right does not of itself constitute laches; the delay involved must work to the disadvantage and prejudice of the defendant." *Ewing v. Ewing*, 901 S.W.2d 330, 333 (Mo.App.W.D.1995), quoting *Metro. St. Louis Sewer District*. Thus, as the Court made clear:

> [e]quity does not encourage laches. * * * Laches cannot be invoked to defeat justice. It will be applied only where enforcement of the right asserted would work an injustice. * * * The burden of proof as to laches rests on the party asserting it * * *. '* * * ***Where no one has been misled to his harm in any legal sense by the delay, and the situation has not materially changed, the delay is not fatal.*** * * *" *Lake*

Development Enterprises, Inc. v. Kojetinsky, 410 S.W.2d 361, 367—368 (Mo.App.1966).

Metro. St. Louis Sewer Dist., 495 S.W.2d at 656–57 (emphasis added).

There is no evidence that Chesterfield's failure to bring suit earlier caused any political subdivision or other entity or person to be misled "to his harm." Nor could there be such evidence. Indeed, all of the presumptions that inform any decisions about tax revenues, commercial development and bond financing involve economic guesses. But more important, they assume that statutes will remain the same. The legislature can, on a whim, alter the law. And the constitution, which stands as a bulwark against legislative misdeeds, has not changed, its enforcement always available to those who believe that it has been violated in ways no other has tried.

Conclusion

The trial court erred in applying the doctrine of laches to defeat the City's claim.

IV.

The Trial Court Erred In Concluding That The Closed-Ended Classifications Of Municipalities In The St. Louis County Sales Tax Law Do Not Violate Mo. Const. Art. III, §40 (30) *Because* § 66.620 Is A Special Laws *In That* The Statutes Place St. Louis County Municipalities Within Immutable Categories Based On Historical Facts And There Is No Substantial Justification For Making These Laws Special Rather Than General.

Standard of Review

The Court here reviews summary judgment. Review is *de novo*. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. 1993). No deference is due the trial court judgment. *Id.*

A. Introduction

Art. III § 40(30) provides:

The general assembly shall not pass any local or special law:

* * *

(30) where a general law can be made applicable, and whether a general law could have been made applicable is a judicial question to be judicially determined without regard to any legislative assertion on that subject.

Point IV focuses on the municipal classifications erected – and made immutable – by §§66.600, RSMo and 66.620 "the Law"). For purposes of Point IV, the Court need not consider whether the application of these statutes to St. Louis County alone violates the constitution. For this Point, the St. Louis County Sales Tax Law ("the Law") targets (and has always targeted) municipalities within St. Louis County – and in so doing creates two immutable classes of cities based not on population, or assessed valuation, or any other open-ended criteria, but on two immutable historical facts: whether a St. Louis County city (b) was incorporated on October 3, 1977 and (b) had an existing city sales tax on October 3, 1977.

"Legislation that is [closed-ended] typically singles out one or a few political subdivisions by permanent characteristics." *Bd. of Educ. of City of St. Louis v. Missouri State Bd. of Educ.*, 271 S.W.3d 1, 10 (Mo. 2008). A special law is "a statute which relates to *particular persons or things* of a class." *City of Springfield v. Sprint Spectrum, L.P.,* 203 S.W.3d 177, 184 (Mo. banc 2006). "Classifications based upon historical facts, geography, or constitutional status focus on immutable characteristics and are therefore facially special laws." *Tillis v. City of Branson*, 945 S.W.2d 447, 449 (Mo. 1997). "The unconstitutionality of a special law is presumed." *Harris v. Missouri Gaming Comm'n*, 869 S.W.2d 58, 65 (Mo. 1994).

Section 66.600 permitted St. Louis County to adopt a county-wide sales tax that rendered all existing city sales taxes "void and of no effect" if the voters of St. Louis County approved a county-wide sales tax. Section 66.620 divides the county-wide sales tax revenue – and it is County, not city, revenue – between Group A and Group B cities. The Group A cities kept their sales tax revenue; the Group B cities receive distributions of the county-wide tax according to a statutory formula.

Group B cities can never become Group A cities. The apparent purpose of this statutory immutability is likely a political one – to grandfather and forever protect the sales tax revenues of existing taxing municipalities – while barring the same status and protections to new municipalities or existing cities that did not impose a tax prior to October 3, 1977.

The Law creates islands of a protected, hereditary royalty (Group A) existing in a sea of socialism (Group B). The Group A cities keep their own revenue yet take full advantage of what others pay for in terms of county-wide services. The Group B cities, which have no ancestral privilege and can never become royalty, contribute to the whole, sharing their revenues to fund, among other things, the very services that are provided the Group A cities by the County at no cost to the Group A cities. For Group A, the statute effectively adopts a "what's mine is mine and what's yours is

partially mine, too" rule. And just as royalty usually does, the Group A cities preserved their options, maintaining an ability to become Group B cities if their economic circumstances changed and Group B status improved their economic lot. §66.620.7. Thus, as economic activity in St. Louis County moves west, Group A cities can enhance their "take" by electing Group B status. Group B cities never have the opportunity to become Group A cities and, as economic activity moves their way, some Group B cities become economically disadvantaged relative to their sales tax revenue by their permanent, immutable status.

Unlike Group A's "what's mine is mine" rule, Group B cities are saddled with a different rule from which they cannot escape. For Group B cities, "what's mine is not mine, but available for redistribution by a formula to everyone, even for the use and benefit of cities that do not contribute."

B. The Statutory Scheme

Prior to 1969, property and utility taxes were the principal sources of revenue for St. Louis County and its municipalities. In 1969, the legislature adopted §94.500, RSMo- §94.550, RSMo (the "City Sales Tax Act"), which authorized Missouri cities to impose a sales tax up to one percent on retail sales with voter approval.

In 1977, the General Assembly authorized the governing body of any county of the first class having a charter form of government and not containing a city with a population of four hundred thousand or more to adopt by ordinance a countywide sales tax on retail sales to benefit both the incorporated and unincorporated areas of that county. Only St. Louis County fell into that description. The county-wide tax required voter approval. §66.600.

St. Louis County voters adopted the county-wide sales tax in October, 1977. Adoption of the county-wide tax voided all city taxes within St. Louis County. §66.600.

Prior to passage of the countywide sales tax, 54 municipalities in St. Louis County had adopted a city sales tax. Section 66.600 rendered those 54 city sales taxes null and void upon passage of a county-wide tax.

According to §66.620, "Group A cities shall consist of all cities, towns and villages which are located wholly or partly within the county which levied the tax and which had a city sales tax in effect … on the day prior to the adoption of the county sales tax ordinance…." Group B cities "shall consist of all cities, towns and villages which are located wholly or partly within the county which levied the tax and which did not have a sales tax approved by the voters of such city … on the day prior to the effective date of the county sales tax and shall include all unincorporated areas of the

county which levied the tax." Again, ***the only difference between Group A and Group B is two historic facts – whether a city (a) existed and (b) levied a tax on October 3, 1977 – a specific historical day.*** Wiping out the city sales taxes created a political problem if voter approval was necessary. Thus, the St. Louis County Sales Tax Law assured existing taxing municipalities that they would still get the amount of revenue generated by sales in their cities. The Law protected "point of sale" for Group A cities, but no other part of the County. Section 66.620 also contained a mandatory distribution of county sales tax revenues into three groups:

- First, Group A
  - (existing cities with a sales tax);
- Second, Group B
  - ((a) existing cities with no sales tax,
  - (b) new cities formed after the adoption of the county-wide sales tax and
  - (c) the unincorporated areas of St. Louis County and;
- Third, the county itself (to whose collections in the unincorporated areas no city could lay claim).

As noted, Group A cities were allowed to keep the county sales tax revenue generated in their cities. Group B divided the county sales tax collections

according to various formulas adopted over the years. The 1977 County Sales Tax Law also allowed any A city to become a part of Group B and for any city that did transfer to Group B to once again become an A city beginning in 1980 and every tenth year thereafter. The ability to go from A to B and back to A every tenth year ended with the passage of the 1993 amendments to §66.620. Now, an A city that elects to become a B city must remain a B city.

Section 66.620 was last amended effective August 28, 2016, with the previous version §66.620 repealed and re-enacted. (L.2016, H.B. 1561 §A, eff. Aug. 28, 2016).

Section 66.620 establishes a formula for distribution of the county sales tax money. For purposes of the distribution, the director of revenue "[a]fter deducting the distribution to the cities, towns and villages in Group A shall distribute funds in the county sales tax trust fund to cities, towns and villages and the County in Group B as [according to the formula]…." The formula has changed numerous times over the years. Today, Group A cities share a portion of their revenue with the pool, keeping a substantial majority over a base guarantee (between 75% and 92.5%) for themselves.

C. Section 66.620 is Facially a Special Law under Pre-*Jefferson County Fire Protection District* Law.

Prior to the Court's 2006 decision in *Jefferson County Fire Protection District Ass'n. v. Blunt,* 205 S.W.3d 866, (Mo. 2006),"[t]he determination whether a statute is a special law under § 40(30) rests on whether it is "open-ended." *Harris v. Missouri Gaming Comm'n,* 869 S.W.2d 58, 65 (Mo. 1994). That remains the law.

"Classifications are considered open-ended if it is possible that the status of members of the class could change. *State ex rel. City of Blue Springs v. Rice,* 853 S.W.2d 918, 921 (Mo. banc 1993); *O'Reilly v. City of Hazelwood,* 850 S.W.2d 96, 99 (Mo.1993). "***Classifications based on historical facts***, geography, or constitutional status focus on immutable characteristics and are [not open-ended and] therefore ***facially special laws***." *Blue Springs*, 853 S.W.2d at 921. *Accord, School District of Riverview Gardens v. St. Louis County,* 816 S.W.2d 219, 222 (Mo. 1991). All of these legal conclusions were ratified by this Court in *City of DeSoto v. Nixon*, 476 S.W.3d 282, 287 (Mo.2016).

1. The Group A and Group B cities' classifications are based on an historical fact.

As previously shown, the classification of Group A cities, is, by definition, based on whether the city was incorporated and levied a city

sales tax on October 3, 1977, that is, "the day prior to the adoption of the county sales tax ordinance…." §66.620.1. "[T]he day prior to the adoption of the county sales tax ordinance" is an historical fact.

2. Group B status is immutable.

Historical facts are immutable. So is Group B status for the initial Group B cities. A classification based on a date in the past alone cannot be entered from the future. The classification is closed because the time of eligibility is closed. "The 1980 census is an unchanging historical fact—making it completely impossible that the status of a political subdivision under this classification could change. Therefore, it is an immutable characteristic…." *Blue Springs*, 853 S.W.2d at 921.

D. Section 66.620 Violates Art. III, § 40(30).

1. There is No Special Justification for a Special Law Creating Group B's Immutable Status

> "The party defending a closed-ended, facially special statute must demonstrate a "substantial justification" for "the special treatment of the classification. A 'substantial justification' requires more than a rational basis. Because the St. Louis County Boundary Commission Act is not open-ended, the respondents must do more: they must demonstrate a substantial justification…."

O'Reilly v. City of Hazelwood, 850 S.W.2d 96, 99 (Mo. 1993)(citations omitted). The trial court appears to have misapplied the standard. ***The issue is not whether there is a "substantial justification" for the Law; rather, the "substantial justification" must be for there being a special law rather than a general law.***

"Substantial justification" requires proof of "a reasonable basis in law and in fact" for the special rather than general law. Black's Law Dictionary (10th ed. 2014)(defining "substantially justified"). Thus, in *Hazelwood*, the Court concluded that the statute violated §40(30) when the legislature "created a boundary commission for St. Louis County (which was defined by a closed-ended classification) and no substantial justification for excluding other counties from choosing to have a boundary commission existed." 850 S.W.2d at 99.

The substantial justification test essentially implements Art. III. §40(30)'s escape clause – that a special law is constitutional unless "a general law could have been made applicable." Said differently, but with the same meaning, a special law is unconstitutional if a general law could have achieved the same end.

And what is the end achieved by the St. Louis County Sales Tax Law? The County's need for increased revenues to meet the demands of its growing population in its unincorporated areas in the 1970's in the face of

fears that annexation might further erode the County's revenues and cities would collect all the taxes. The trial court summarized it distinctly. "This system provided revenue resources for St. Louis County to fund services provided to the uniquely large unincorporated areas, as well as those services provided countywide. This system also provided revenue to cities that did not previously have a City Sales Tax." (LFApp.Doc176 at 3-4.)

Implicit in this conclusion is the assumption that a city without a sales tax – which had lived within the means provided it by an ad valorem tax – was nevertheless entitled to a sales tax anyway.

2. The trial court's rationale

The gravamen of Chesterfield's attack on §66.620 focuses on the municipal classification itself created in §66.620. *See* LFApp.Doc.100 Counts III and IV. Dividing the cities into two groups based on a historic fact renders it a special law. Nonetheless, the trial court concluded that a substantial justification existed for the §66.620 revenue distribution scheme because St. Louis County was so different that no other county faced its particular issues, not because a general law would not work. Thus, the trial court concluded that "Chesterfield's evidence …does not undermine the substantial justification articulated by the Defendants and Intervenor-Defendants in *defense of Section 66.620's tax revenue distribution scheme*." (LFApp.Doc.176 at 6) (italics added).

And what was that defense? Examining the justification for the tax distribution scheme, the trial court reasoned that the change in the law announced by the Court in *City of Town & Country v. St. Louis County*, 657 S.W.2d 598 (Mo.1983) and the existence of groups targeting unincorporated areas of the County for incorporation "would be to shrink the population in Group B and reduce the amount of revenue from the County Sales Tax that goes to St. Louis County and the Group B cities." (LFApp.Doc.176 at ¶5). The trial court continued,

> The 1984 amendment halted annexations aimed at acquiring increased sales tax revenues (at the expense of Group B) by providing that taxes generated in an annexed Group B area would continue to be distributed with the pool (Group B) while the pre-annexation Group A area would continue point of sale. The 1984 amendment also addressed the incorporation of unincorporated areas within St. Louis County by requiring that all newly incorporated cities be part of Group B, with no option to move to Group A.

Id. at 6.

At the bottom of the trial court's conclusions was the point of sale distinction that it believed drove the Group A and Group B classifications. "Under the City Sales Tax Act, cities with less retail activity received

substantially less tax revenues than cities with high retail activity, as all sales tax revenue stayed with the 'point of sale' city. This tax revenue scheme disproportionately benefited those cities with large retail centers, [that is, cities with a sales tax and retail sales] to the detriment of high-population, low-retail cities [who had no sales tax]." *Id.* at 3.

This logic collapses under even mild, rationally based scrutiny.

First, every city had the authority to impose a sales tax prior to the passage of the St. Louis County Sales Tax Law if its voters wanted one. Every city also already collected ad valorem taxes, and for many, these taxes were sufficient because their low-retail status meant that the traffic, law enforcement and public safety issues that attend high-retail areas did not exist there.

Second, the fact that high-retail Group A cities generated significant revenue added nothing to St. Louis County's revenue under the Law's scheme. This was because those high-retail cities with sales taxes got to keep all of the sales tax generated within their boundaries. Preservation of the point-of-sale held by these cities was at the core of the Law.

The trial court then determined that: "With the new countywide sales tax in place, those cities that had enacted a City Sales Tax continued to receive the taxes generated within their boundaries…." *Id.* In other words, if a Group A, high-retail city had a city sales tax, there would be no

redistribution of that city's sales tax revenues. The trial court's rationale collapses onto itself.

3. Neither law nor fact support the trial court's rationale for permitting a special law.

More importantly, the trial court's logical meanderings answered the wrong question. A justification (much more, a substantial justification) for the revenue distribution system is not the §40(30) issue.

Validation of the special law requires substantial justification for this conclusion: a general law could not work. Again, Article III, §40(30) provides:

> The general assembly shall not pass any local or special law:
>
> ***
>
> (30) where a general law can be made applicable, and whether a general law could have been made applicable is a judicial question to be judicially determined without regard to any legislative assertion on that subject....

Thus, the proper question for purposes of §40(30), which the trial court never addressed, is whether a general law might have achieved the same end as the St. Louis County Sales Tax Law. Could a law have been crafted to apply equally to all St. Louis County cities, without regard to their status on October 4, 1977, that would have achieved the same end?

If one assumes for argument's sake alone that there is a rational basis for the General Assembly singling out St. Louis County in the first place (Chesterfield does not so concede), the goals of allowing St. Louis County to increase its revenue through a sales tax and distributing the funds to cities could have been achieved by a simple per capita distribution of revenue to cities, requiring no special law as to the classification of cities. As the Intervenor-Defendants noted in their statement of uncontested material facts, "Senator Schneider … had in the past supported legislation for a countywide per capita distribution." (LFApp.Doc106 at ¶38). This solution would have been a general law, treating all cities, existing or later-formed, taxing and not taxing, alike.

Alternatively, the General Assembly could simply have passed the County Sales Tax Law without §66.620. The County could then appropriate funds to cities, even doing so with an ordinance that followed §66.620. All §66.620 accomplishes is a mandatory appropriation process for County sales tax revenues; indeed, §66.600 makes it plain that the County Sales Tax Law makes all sales taxes collected County funds.

Again alternatively, the General Assembly could have chosen what it did with regard to the rest of the counties in the state – employed a general law to authorize a county sales tax and let the cities maintain their own sales tax. See, §67.505 (A-36) (permitting county sales taxes up to one-

half of one percent coupled with an ad valorem levy reduction, all with voter approval) and §94.510 (permitting any city to impose a city sales tax of up to one percent, with voter approval). This plan was in effect when the St. Louis County Sales Tax Law was repealed and re-enacted in 1983 and could have served as the model for treating the cities equally.

Instead, the distinctions drawn in §66.620 divide existing cities (a natural class) into two groups based not on their status as cities on October 4, 1977, but on the existence of a city sales tax on October 4, 1977 (a distinction that artificially divides a natural class). Again, "[a] general law is 'a statute which relates to persons or things as a class,' while a special law is 'a statute which relates to *particular persons or things* of a class.' *Sprint Spectrum, L.P.,* 203 S.W.3d at 184 (Mo. 2006). The singling out of particular kinds of cities in a class of cities is a special law. *See*, *Massey-Harris Harvester Co. v. Fed. Reserve Bank of Kansas City*, 104 S.W.2d 385, 388 (Mo.1937), *overruled in part on other grounds by City of St. Louis v. Butler Co.*, 219 S.W.2d 372 (Mo. 1949)("The Legislature may legislate in regard to a class of persons, but they cannot take what may be termed a natural class of persons, split that class in two, and then arbitrarily designate the dissevered fractions of the original unit as two classes, and enact different rules for the government of each").

The trial court concluded that §66.620's tax distribution scheme was justified because

> St. Louis County is responsible for providing municipal-type services, such as police, street maintenance, and zoning, to the unincorporated areas within its borders, while at the same time providing services that benefit all residents of St. Louis County, including those living within municipalities (such as a court system, jail and roads).

(LFApp.Doc179 at 3). But the trial court's "rationale" proves the point: Group A cities, which received county-wide benefits from the County sales tax, paid nothing for them originally (and, at most, a highly discounted rate under the last amendment to §66.620). Group B *cities,* which did not receive the benefits from the County identified by the trial court for unincorporated areas, nevertheless paid for those benefits as well as those that they and Group A cities received.

This tax/no tax distinction alone provides the explanation for the special legislation – the political problem in obtaining voter approval of the County's sales tax if 54 cities stood to lose their existing sales tax revenues. Whoever designed this Law rightfully feared that the voters might not approve the law unless existing cities with taxes would sacrifice nothing by its passage. That is a political problem, not a policy.

No case has held that political difficulty creates constitutional justification. The prohibition against special laws is designed, among other things, to require the legislature to make policy generally, not to solve political problems locally. Substantial justification means unique legal and factual elements that make a general law impossible as a vehicle to obtain a policy result; it does not mean that a special law is justified by the political deal necessary to obtain approval locally.

Conclusion

Section 66.620 is a special law. It "relates to *particular persons or things of* a class" rather than what a general law would do -- relate "to persons or things as a class." *Sprint Spectrum, L.P.,* 203 S.W.3d at 184. As a special law, there must be a substantial justification for the law being special, as opposed to general. The trial court believed there was a substantial justification for the revenue distribution scheme. That misplaced focus kept the trial court from doing the proper constitutional analysis. The proper analysis would have shown that the law dividing the cities in St. Louis County not as cities, but based on their taxing status in 1977, could have achieved the same end by a general law. Thus, §66.620 violates Art. III, §40(30).

Chesterfield agrees that if the Court agrees, the decision can be applied prospectively only.

The judgment of the trial court should be reversed.

V.

The Trial Court Erred In Concluding That The St. Louis County Sales Tax Law Does Not Violate Mo. Const. Art. III, §40 (30) *Because* § 66.600 Is A Special Law *In That* The General Assembly Changed the Classification Definition to Assure that St. Charles County, Which Would Have Been Eligible For §66.600 Status, Would Not Become Eligible For That Status And This Is Undeniable Proof That The Law Is A Special Law And That A General Law Could Be Made Applicable.

Standard of Review

The Court here reviews summary judgment. Review is *de novo*. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. 1993). No deference is due the trial court judgment. *Id.*

A. Introduction

In 2006, *Jefferson County Fire Protection Dist.*, 205 S.W. 866, took a significant step toward restoring meaning to Art. III, § 40(30) where population-based classifications were so narrow that they showed an intent on the legislature's part to target a specific county with special legislation. Until that case, the Court had assumed that if a population-

based classification existed, a remote chance that some other county might one day meet the definition made the classification open-ended and, therefore, not constitutionally suspect.

Jefferson County determined that narrow population classifications would no longer enjoy a presumption of constitutional validity against a § 40(30) attack. The narrowness itself was an indicium of specific legislation because

> (1) a statute contains a population classification that includes only one political subdivision, (2) other political subdivisions are similar in size to the targeted political subdivision, yet are not included, and (3) the population range is so narrow that the only apparent reason for the narrow range is to target a particular political subdivision and to exclude all others.

Id. At 870-71. "If all three circumstances exist, the law is no longer presumed to be general, but is presumed to be a special law, requiring those defending it to show substantial justification for the classification." *Id.* at 871. *City of Normandy v. Greitens,* 518 S.W.3d 183, 195–96 (Mo. 2017), extended the *Jefferson County* analysis "to apply to statutes setting a population minimum or maximum rather than a narrow population range." *Id.*

B. Clear Legislative Intent to Target St. Louis County

The *Jefferson County* elements, if they exist as to a particular piece of legislation, become proof that a superficially open-ended nature of population-based classifications is but a subterfuge for special legislation.

This case brings a new set of undisputed facts that prove, even without application of the *Jefferson County* elements, that a superficial population-based classification was but a subterfuge for special legislation. Here, the legislature changed the definition of the county to which it applies in §66.600 so as to assure that no other county could qualify for statutory inclusion. This tailoring of §66.600 to assure exclusivity to St. Louis County is (a) proof that the law is special, (b) was never intended to be open-ended, and (c) should result in a presumption of constitutional invalidity that attaches to closed-ended statutes. Thus, aside from the proof elements required in *Jefferson County*, the law should be – if §40(30) is to have meaning – that where the legislature has changed the population-based classification to assure exclusivity, a statute is presumed to be unconstitutional and will stand only if there is a substantial justification for the special law, rather than a general one.

This proposed rule recognizes that the General Assembly may betray its intent to create a special law, not by the subterfuge of narrow open-ended population classifications, but by subsequent amendments to the

statute to redefine its scope to eliminate others' becoming eligible and thus assuring continued exclusivity (special application) over time. Indeed, given this evidence, the special nature of the law is plain for all to see.

C. Section 66.600 is a special law meant to apply to and target St. Louis County alone.

Specifically, the 1977 version of §66.600 authorized a "county of the first class having a *charter form of government* and not containing *a city with a population of four hundred thousand* or more," to adopt an ordinance and conduct a public referendum vote for the county to impose a county sales tax of one per cent for both its incorporated and unincorporated areas. (Laws of Missouri 1977, p. 173-178)(italics added). Jackson County, the only other charter county in 1977, included Kansas City, with a population over four hundred thousand in the 1970, 1980, and 1990 U.S. Census. (LFApp.Doc 155 at ¶121). It is undisputed that this classification included only St. Louis County.

In April 1992, St. Charles County, a first-class county, adopted a charter form of government. The process to formulate the charter began in 1991. Based upon the 1990 Census, St. Charles County did not contain a city with a population of four hundred thousand or more – its total population was 212,907. Id. at ¶124.

The 1990 census revealed that St. Louis County had a population of 993,529. (1990 Census). In 1991, S.B. 34 amended § 66.600 to increase the necessary population for classification to "any county of the first class *having a charter form of government* and having a *population of nine hundred thousand* or more." (Laws of Missouri 1991, pp. 380-404)(emphasis added). Note that a city population is no longer part of the classification's definition.

Had the legislature not amended §66.600, St. Charles County would have entered the §66.600 statutory classification with the adoption of its charter – it became a charter county with no city exceeding a population of four hundred thousand in 1992.

The Court's previous rationale for entertaining the presumption of constitutionality for open-ended population classifications allowed "the legislature to address the unique problems of size with focused legislation; it also permits those political subdivisions whose growth or decline brings them into a new classification the advantage of the legislature's previous consideration of the issues facing similarly situated governmental entities." *Sch. Dist. of Riverview Gardens v. St. Louis Cnty.*, 816 S.W.2d 219, 222 (Mo.1991). Were such open-endedness the rationale for §66.600, however, St. Charles County could have taken advantage of the St. Louis County Sales Tax Law, had it chosen to do so – assuming that a city's

population was the actual motivator for §§66.600-.630. The fact that the legislature quickly moved to exclude a county that appeared poised to enter into the §66.600 classification removes any doubt that might have existed about the purpose of §66.600. Section 66.600 is aimed at a single county and meant only for a single county in perpetuity. It is a special law, not a general one.

D. There is no substantial justification for a special law targeting St. Louis County when a general law would have worked.

Again, the trial court summarized the purpose of the law as follows: "This system provided revenue resources for St. Louis County to fund services provided to the uniquely large unincorporated areas, as well as those services provided countywide. This system also provided revenue to cities that did not previously have a City Sales Tax." (LFApp.Doc176 at 3-4).

First, any city that wanted a sales tax had the opportunity to adopt one in St. Louis County prior to 1977. The last sentence of the trial court's rationale ignores this reality.

Second, in regard to the need to provide county-wide services and services to unincorporated areas, St. Louis County is surely not alone. Jackson County provides county-wide services (courts, jail, sheriff's services, roads) with revenues it collects, while hosting a major city that

collects its own tax, provides its own police department, etc. Where cities take on the load of police and roads, to name just two of the overlapping services, the cities actually relieve a county of responsibility or at least provide redundant services. The existence of 54 taxing cities, taken together, places St. Louis County in no appreciably worse, better, or different position than Jackson County, which likewise has considerable unincorporated land for which it must provide services without the aid of any city, and which must provide county-wide services even for the cities.

Yet Jackson County provides for its revenue needs with the historic ad valorem taxes that St. Louis County also collects and with a dedicated sales tax, which St. Louis County could likewise have adopted under §67.505, while leaving cities that wanted to collect their own sales tax free to do so (or not, as the voters chose). §§94.500 et seq.

It is sophistry to conclude that the general laws that serve the rest of Missouri would not serve St. Louis County.

Further, there is simply no explanation for the legislature's decision to cut St. Charles out of §66.600 except constitutional chicanery. If the problems that face St. Louis County are the product of (a) having a charter form of government and (b) having no city larger than four-hundred thousand, then those problems likely exist (or will exist) for St. Charles County – as it becomes the new St. Louis County thanks to population

movement west. Yet St. Charles County operates with exactly the same classification that St. Louis County operated under until 1992, but does so under the general laws of the state relating to counties and cities.

The point is this: A general law would have achieved the ends §66.600 sought to achieve. Given the legislature's clear, if unintended, expression of its purpose to pass a law only for St. Louis County, that law must be deemed a violation of §40(30).

This law, with its amendment to secure exclusivity, is further proof of James Madison's observation in *Federalist No. 46*. "[E]veryone knows that a great proportion of the errors committed by the State legislatures proceeds from a disposition to sacrifice the comprehensive and permanent interest of the State to the particular and separate views of the counties or districts in which they reside,…." *Id.* Madison went on to show that where those elected to the legislature supposedly to care for the whole (here the State of Missouri) are given the opportunity to placate their own voters by caring for the local, "improper sacrifices" will be made to "local considerations" to the detriment of the whole. Article III, §40(30) was designed to make local legislation unconstitutional, for the very reasons Madison, and others, have articulated.

E. Alternatively, *Jefferson County* applies in this case.

If the Court does not adopt the suggested new standard for determining whether a law is a special law proposed by Chesterfield – that a legislative redefinition to assure exclusivity is presumptively unconstitutional as a special law – Chesterfield asserts that *Jefferson County* should apply to this case.

As previously shown, *Jefferson County* changed the standard when it established a multifactor test for overcoming the presumption of constitutionality previously attached to population classifications. Under the new standard, the presumption is overcome if: "(1) a statute contains a population classification that includes only one political subdivision; (2) other political subdivisions are similar in size to the targeted political subdivision, yet are not included; and (3) the population range is so narrow that the only apparent reason for the narrow range is to target a particular political subdivision and to exclude all others." *Id.* at 870-71. If the factors are met, "the law is no longer presumed to be general, but is presumed to be a special law, requiring those defending it to show substantial justification for the classification." *Id.* at 871. The substantial justification burden is higher than the previous rational basis test.

The Court applied *Jefferson County* only prospectively, that is, to legislation passed after 2006. Section 66.620, which appropriates county

sales tax revenues to municipalities in St. Louis County based on immutable historical and geographic facts, was repealed and reenacted in 2016. Because §§66.600 and 66.620 both relate to the same subject matter – the County Sales Tax – they must be interpreted *in pari materia*. "All consistent statutes relating to the same subject are *in pari materia* and are construed together as though constituting one act, whether adopted at different dates or separated by long or short intervals." *State ex rel. Rothermich v. Gallagher*, 816 S.W.2d 194, 200 (Mo.1991). Thus, § 66.600 must be interpreted *in pari materia* with Section 66.620. *McQueen v. Gadberry*, 507 S.W.3d 127, 139 (Mo.App.E.D.2016) ("Pursuant to the doctrine of *in pari materia*, consistent statutes relating to the same subject matter are to be construed together as though they constitute one act, and we presume the statutes were intended to be read harmoniously").

Section 1.120, RSMo (A-11) provides that "[t]he provisions of any law or statute which is reenacted, amended or revised, so far as they are the same as those of a prior law, shall be construed as a continuation of such law and not as a new enactment." If that is so, the issue becomes one of severability. § 1.140 RSMo. (A-13). If §66.620 is unconstitutional, would §66.600 stand alone?

The decision that the two challenged statutes are so intertwined as to be inseverable would have this salutary effect. The general sales tax

laws applicable to every county but St. Louis County would empower St. Louis County to impose a sales tax. The general sales tax laws applicable to every city in Missouri except those in St. Louis County would allow cities in St. Louis County to have their own sales tax.

Application of *Jefferson County* to §66.600, when it must be read with a statute that is unconstitutional, would be consistent with the constitution and with the laws governing severability.

But this Court need not apply *Jefferson County*. Adopting Chesterfield's proposed proof that the law is special – that the legislature amended it to assure exclusivity – will honor the constitution and make application of *Jefferson County* unnecessary.

Conclusion

The judgment of the trial court as to §66.600 should be reversed.

VI.

The Trial Court Erred In Finding That §§66.600 And 66.620 Do Not Violate Art. III, §40(21) *Because* §§ 66.600 And .620 Is A Special Law Regulating The Affairs Of St. Louis County *In That* §66.620 Appropriates Only St. Louis County General Revenues And The Appropriation Of County Funds Is An Affair Of St. Louis County Within The Meaning Of §40(21).

Standard of Review

The Court here reviews summary judgment. Review is *de novo*. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. 1993). No deference is due the trial court judgment. *Id.*

A. The constitutional standard

The general assembly shall not pass any local or special law:

***

(21) creating offices, prescribing the powers and duties of officers in, or regulating the affairs of counties, cities, townships, election or school districts;

MO. CONST. Art. III, §40(21). This constitutional provision comes verbatim from MO. CONST. Art. IV, §53 (1875). (A-57)

Importantly, and unlike §40(30), §40(21) contains an absolute prohibition. It permits no special law regulating the affairs of a county. If the law is a special law – that is, the law applies to a single county – and regulates the affairs of that county, it is unconstitutional, even if there is a rational basis for it being a special law.

B. The trial court's rationale

The trial court's treatment of the §40(21) claim provided:

> Nor does Section 66.620's tax revenue distribution scheme "regulat[e] the affairs of counties, cities, townships, election or school districts."... The Group A/Group B tax revenue distribution scheme of Section 66.620 is therefore not subject to a special law challenge pursuant to Article III, Section 40(21) or (30) of the Missouri Constitution. *See also, Berry v. State of Missouri*, 908 S.W.2d 682, 684 (Mo. banc 1995)("The legislature has authority to designate, by general law, the distribution of a county sales tax for local government purposes.")

LFApp.Doc.176 at 5.

C. *Berry* did not consider an Art. III, § 40(21) challenge

The trial court's reliance on *Berry* was misplaced. Berry's language, which is at best dicta, related to an Art. VI, §15 (A-56) challenge to §66.620. That constitutional provision provides:

> The general assembly shall provide by general laws for the organization and classification of cities and towns. The number of such classes shall not exceed four; and the powers of each class shall be defined by general laws so that all such municipal corporations of the same class shall possess the same powers and be subject to the same restrictions.

Art. VI, §15.

The Group A cities in *Berry* asserted that §66.620 "divides the cities of the same class into Group A and Group B, in violation of Article VI, § 15." *Id.* at 684. *Berry* held the cities were treated alike as to their power to tax – they had no power to tax after the adoption of the St. Louis County Sales Tax Law. *Id.* The Group A cities' claim that they had a different "'restriction' because cities of the same class have different 'power' to receive revenue from the countywide tax" was not what Art. VI, §15 encompassed. *Berry* then noted that Art. X, § 1 (A-58) and Art. X, §11(f) (A-59) grant the General Assembly control over local sales taxes. Relying *on St. Louis County v. University City*, 591 S.W.2d 497 (Mo. banc 1973)

and *State ex rel. Emerson v. Mound City*, 73 S.W.2d 1017 (Mo. 1934), *Berry* said "The legislature thus has authority to designate, ***by general law***, the distribution of a county sales tax for local government purposes." *Berry*, 908 S.W.2d at 684 (emphasis added).

It follows that if §66.620 applied to every county, the teaching of *Berry* would control. *University City* involved the road and bridge tax. The Court relied on *State ex rel. Moberly Special Rd. Dist. v. Burton*, 182 S.W. 746, 749 (1915), which upheld the road and bridge taxing statute because: "we find from their terms that they apply alike to all road districts in the state which may be organized as bodies corporate and are conducted in conformity with the provisions of these acts." Certainly §66.620 does not apply to all counties.

Mound City involved this issue:

> Can a city of the fourth class having a population of less than ten thousand be compelled by mandamus to levy and collect an annual tax in excess of the usual statutory rate of 50 cents on the $100 valuation to be used for ordinary city purposes, in order to pay a valid judgment rendered in a personal injury action?

Id. at 1018. The Court answered by denying the city the authority to levy taxes in excess of the amount permitted by the constitution. In dicta, the

Court wrote that, as to a special tax (a library district tax, for example) and as a condition of receiving the special benefit created by the specific taxing authority, a statute may "direct and compel such city to use a designated part of its annual revenues for a designated purpose for which the city receives a special benefit." *Id.* at 1026. Of course, all this must be done with a general law.

The *Berry* dicta does not address the issue here. Indeed, research reveals no case in which the Court has addressed the attempt by the General Assembly to appropriate general county revenues in a single county in light of the severe limitation on legislative authority imposed by §40(21).

D. The use to which general county revenues are put is an affair of the county.

The rules of constitutional construction are well-settled.

> "The fundamental purpose of constitutional construction is to give effect to the intent of the voters who adopted the Amendment." *Keller v. Marion County Ambulance Dist.,* 820 S.W.2d 301, 302 (Mo. banc 1991), *citing, Boone County Court v. State,* 631 S.W.2d 321, 324 (Mo. banc 1982). "In arriving at the intent and purpose the construction should be broad and liberal rather than technical, and the constitutional provision

should receive a broader and more liberal construction than statutes."

Sch. Dist. of Kansas City v. State, 317 S.W.3d 599, 605 (Mo. 2010).

> The words used in constitutional provisions are interpreted so as to give effect to their plain, ordinary and natural meaning. *Boone County,* 631 S.W.2d at 324; *State ex Inf. Danforth v. Cason,* 507 S.W.2d 405, 408 (Mo. banc 1973). The plain, ordinary, and natural meaning of words is that meaning which the people commonly understood the words to have when the provision was adopted. *Boone County,* 631 S.W.2d at 324; *Cason,* 507 S.W.2d at 408. The commonly understood meaning of words is derived from the dictionary. *Boone County* 631 S.W.2d at 324.

Buechner v. Bond, 650 S.W.2d 611, 613 (Mo. 1983).

The affairs of a county means its "public business." *Affair*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (UNABRIDGED)(2002) 35.

"County business" is a phrase examined by the courts prior to the adoption of the 1945 constitution and bears the same meaning as "county affairs." Art. VI, §36 Mo. Const. (1875) (A-57) provided that:

> In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law. ….

Id. State ex rel. Bucker v. McElroy, 274 S.W. 749, 751 (Mo. 1925) held that "[i]n the language of the organic law, the county court 'shall have jurisdiction to transact all county * * * business.' Other business may be added to its jurisdiction by law, but no law can take from it that which the Constitution expressly gives; i. e., that it shall transact all county business." This conclusion followed what the Court described as "the general rule."

> The general rule is thus expressed in 15 C. J., at page 456:
>
> "Except as otherwise provided by law, a board of county commissioners or county supervisors ordinarily exercises the corporate powers of the county. It is in an enlarged sense the representative and guardian of the county, having the management and control of its property and financial interests, and having original and exclusive jurisdiction over all matters pertaining to county affairs. ***Within the scope of its powers, it is supreme, and its acts are the acts of the county***. …"

Id. at. 752. (Emphasis added). *Bucker* also defined "county affairs" as "those relating to the county in its organic and corporate capacity, and included within its governmental or corporate powers."' *Id. quoting* with approval *Hankins v. Mayor*, 64 N. Y. 22.

The cases have also distinguished between county affairs and non-county affairs. For example, "the duties performed by the circuit court and the circuit clerk do not constitute 'county business' within the meaning of section 36 of article 6 of the Constitution." *Graves v. Purcell*, 85 S.W.2d 543, 550 (Mo. 1935). And the state may appropriate county or city funds to perform a state purpose – the exercise of a police system.

> If we are right in our previous declaration that the state, in the exercise of a state function, can constitutionally require one of its cities, towns, or counties to levy and collect a tax to further and ***support a state purpose*** in that city, town, or county, ... The fact that St. Louis is organized under a constitutional freeholders' charter does not affect the question, because, as to all subjects bearing on the matter of its relation to the state government, the general assembly has the same power over its affairs as over any other city; but no claim has been made by the city that it had or has the right to substitute its own police system for that of the state.

State ex rel. Hawes v. Mason, 54 S.W. 524, 533–34 (Mo. 1899). *Mason*'s holding was further explained as follows:

> It would be a step backward for us now to say that the state of Missouri cannot provide a police system for its great cities. It is a mistaken view to urge that the cities alone are interested in this matter of a police force adequate to maintaining the public peace and safety of our citizenship. The state has a vital interest. The citizens of the state, and all parts of it, are forced to these metropolitan centers for business and other reasons. They may not linger long, but, while there, they are entitled to that protection which only an adequate and efficient police force can give. It is not for the cities to say to the state: We will give your citizens just such protection as we think is best. Nor can such cities say to the state: You may man and control the police force if you desire, but if so we will starve your system to death. We hold the purse strings. These municipal corporations are subordinate to the sovereign power of the state, and whilst they do, in a sense, hold the purse strings, they so do by the consent of the state.

State ex rel. Reynolds v. Jost, 175 S.W. 591, 594 (Mo. 1915).

All this is to say that Missouri law allows the general assembly to pass a law appropriating funds in a county where the county is performing *state* responsibilities and functions or, as described in the earlier section, where a special tax is authorized and imposed under a general law. This focus on state responsibilities/ special benefits escape the limitations of §40(21) – either because the law did not regulate *county* affairs or because the law conditioned the special tax on a particular use and distribution and applied equally to every county.

E. The purpose of §40(21).

The Court has already determined that the appropriation of county funds for municipal purposes under §66.620 is *not* a state function. "On this record, financing local governments is a proper public, county, and non-state purpose." *Berry v. State*, 908 S.W.2d at 685. Thus, the appropriation of general county funds by a statute is an invasion of, and therefore a regulation of, the affairs of the county. But, as the Court will recall, there is no constitutional prohibition on a general law regulating the affairs of a county – only a special law attempting to do to so.

Missouri courts have not determined the purpose of §40(21) in this context. Other states, whose constitutions contain essentially identical language, have concluded that "[t[he constitutional proscription against special laws regulating the affairs of counties, cities, townships, wards,

boroughs, or school districts was adopted to put an end to privileged legislation for particular localities and for private purposes." 22 Summ. Pa. Jur. 2d Municipal and Local Law § 1:2 (2d ed.). Further, "[a]s this court stated in *Haverford Twp. v. Siegle,* 346 Pa. 1, 28 A.2d 786, 788 (1942), the proscription against special laws was 'adopted for a very simple and understandable purpose—to put an end to the flood of privileged legislation for particular localities and for private purposes which was common in 1873.'" *Harrisburg Sch. Dist. v. Hickok*, 563 Pa. 391, 396–97, 761 A.2d 1132, 1135–36 (2000).

Rodriguez v. Gonzales, 148 Tex. 537, 227 S.W.2d 791, 793 (1950) held that the primary purpose of the constitutional prohibition against any local or special law regulating the affairs of counties, cities, towns, wards, or school districts "was to secure uniformity in the application of the law which is essential to an ordered society.

The section is not of doubtful construction, but is a plain mandate from the people to the Legislature." And,

> [t]he provision [against special laws regulating the affairs of counties] expressed a fundamental idea in our popular form of government, namely, to commit to local bodies the discharge of functions which can be as well, if not better, discharged by them. For a variety of reasons, the state legislature should not

> be concerned with the administration of those local affairs as to which there exist local legislative bodies, whose acts, motived by the needs of the citizens, are more sure to be pure and efficient.

In re Henneberger, 155 N.Y. 420, 425, 50 N.E. 61, 62 (1898).

F. Section 66.620 is a special law regulating the affairs of St. Louis County

Section 66.620 is a state-mandated appropriation of county sales tax revenues in a single county. Within the rubric of §40(21), it is a special law because it applies to a single county. Every other county's authority to tax is granted by §§67.500 et seq. (A-36) No city outside of St. Louis County is deprived of the authority to have a sales tax. No county other than St. Louis County has it general revenue distributed/appropriated under a state-imposed scheme.

Sections 66.600 and 66.620 violates Article III, §40(21).

Conclusion

The judgment of the trial court should be reversed.

A final word on (a) severability and (b) prospective effectiveness on a determination that the St. Louis County Sales Tax Law is unconstitutional.

Chesterfield acknowledges that a decision applying these constitutional prohibitions to the St. Louis County Sales Tax Law may result in financial hardship for some cities and for St. Louis County. And while the constitution must be enforced, and while difficulties that might attend enforcement of constitutional provisions cannot alter application of the constitutional mandates, it nonetheless follows that realigning the statutes with the constitution can be accomplished gently. The law already permits counties and cities – indeed all counties and cities within Missouri *except* those in St. Louis County – to have their own taxes with voter approval. The law that would ameliorate these hardships is already in place, subject to voter approval of city and county taxes.

Chesterfield respectfully suggests that should this Court declare either §66.600 or §66.620, or both, unconstitutional, the Court should stay the effectiveness of that decision until the cities and county could obtain voter approval of a sales tax already permitted under existing, general law.

This, of course, raises a question of severability. Can either §66.600 or §66.200 be declared unconstitutional while the other survives?

Chesterfield does not believe so. St. Louis County's power to tax was granted at the expense of the power of the cities to tax. As a result, St. Louis County's tax and the power of the cities within the county to tax are so interwoven that pulling the proverbial constitutional thread on either statute unravels the entire scheme. Indeed, St. Louis County's sales tax is currently higher than any other county's permitted sales tax precisely because it taxes for all, rather than permitting cities to have their own taxes. Application of the already existing general law would necessarily require lowering St. Louis County's sales tax while cities could obtain approval for their own taxes. Thus, the statutes cannot be severed and both must be struck if one is struck.

CONCLUSION

For the reasons stated, the Court should declare §§66.600 and .620 unconstitutional, should apply its decision prospectively, and should permit a reasonable transition time for the County and the Cities to adjust to life under constitutional statutes.

Respectfully submitted,

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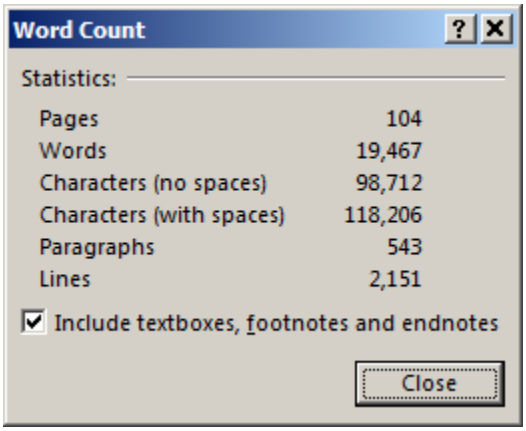
CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies, pursuant to Missouri Supreme Court Rule 84.06(c), that this brief complies with Rule 55.03 and the length limitations contained in Rule 84.06(b) in that there are 19,467 words in the brief (except the cover, signature block, certificate of compliance, and certificate of service) according to the word count of Microsoft Word used to prepare the brief.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of this Brief and Appendix was served on registered counsel via the Missouri Courts E-filing System on May 9, 2018.

/s/ Edward D. Robertson, Jr.