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 REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

Introduction

Appellant Chesterfield raised six points on appeal. The first three dealt with whether res judicata, estoppel or laches required dismissal of the case as the trial court held. The final three focused on the substantive constitutional issues decided against Chesterfield by the trial court.

Respondents' briefs have inverted the order, and even then, taken things out of order. For the Court's ease, Chesterfield's reply will follow the order of Respondents' briefs.

Respondents briefs invoke a number of arguments indicating that a finding that the laws at issue here are unconstitutional would upend county and municipal government. First, Chesterfield agrees that if the statute(s) are found to violate the constitution, the Court may provide for a transition period to permit the changes the constitution requires to be made as gently as possible so that the County and its cities can be given the opportunity to take advantage of the general laws that apply to all counties – so long as they act with all deliberate speed.

Second, the arguments advanced by Respondents are legally no different as to the primacy of the constitution than those advanced by white

suburbanites who believed that integration of schools in 1954 would be bad for their children. In every instance, the constitution must prevail, not the fear of change, nor of the difficulties that following the constitution might produce. Courts can ameliorate the difficulties of a transition – and here, general laws are already in place that will serve the revenue-generation policy ends -- but courts must not amend the constitution to ratify unlawful legislation to avoid disruption. Even were that so, the constitution must prevail.

The briefs go so far as to say that St. Louis County uniquely provides municipal services for unincorporated portions of the County and these would be disrupted even the constitution prevailed in this case. This is a bit of a stretch. First, those services are provided by every county in the state with sales tax revenues authorized under a general law that allows a county to have its own dedicated sales tax. See, §67.505, RSMo. Further those so-called "municipal services" are not the full range of municipal services cities must provide. For St. Louis County those skeletal services are funded for the most part with sales tax revenues generated in Group B cities – which cities also provide the full range of municipal services for their citizens.

Chesterfield, a Group B city, is a net tax exporter; this fact limits Chesterfield to what it can provide its own citizens, even though it now is a high-retail area and faces increasing public safety needs that the County does not provide as a result. Group A cities contribute significantly less to the County's treasury because they were singled out for special treatment in violation of Mo. Const. art. III, §§40(30) and 40(21).

This case is about applying general laws that work well throughout Missouri to St. Louis County.

V.

Introduction

The General Assembly amended §66.600 in 1991. That amendment achieved a singular purpose: to keep St. Charles County from falling within the statutory classification previously adopted and to maintain St. Louis County as the sole/exclusive county to which §66.600 could apply.

In 1991, Missouri law held that facially open-ended population classifications were "presumed to be constitutional." *Jefferson County Fire Protection v. Blunt*, 205 S.W.3d 866 (Mo. 2006)(citation omitted)(summarizing existing law).

Importantly, the presumption could be overcome by a showing that "the statutory classification is arbitrary and without a rational relationship to a legislative purpose." *Id.* The test was whether "the classification is made on a reasonable basis." *Id.*

Art. III, §40(30) requires a comparison – but not a comparison between reasonable and unreasonable but between whether it was reasonable to adopt a special law or unreasonable to do so because a general law would achieve

a similar policy end. Thus, the Court must determine whether a reasonable, nonarbitrary basis for a special law rather than a general law existed.

Under equal protection jurisprudence, which the Court has invoked, the comparison is between classes established by a law. "The first step requires a court to identify the classification at issue to ascertain the appropriate level of scrutiny." *Amick v. Dir. of Revenue*, 428 S.W.3d 638, 640 (Mo. 2014). The proper comparison under Art. III, §40(30) is not between classes, but between a general law and a special law. Thus, the reasonable/rational basis test here requires that §66.600 be found unconstitutional if there is no rational/reasonable basis for there being a special law rather than a general one.

The reasonable basis test resulted from a judicial belief that an open-ended, population-based classification applicable initially to a single political subdivision alone was not really a special law devoted to a single qualifying entity/person because "others may fall into the classification." *Id.* The reasonable basis was that the benefits to the specially situated county were necessary and that others who fell into the category would likewise need/benefit from the same statutory treatment. The open-ended,

population-based classification was thus effectively not a special law limited to a single county at all, but could become a general law applicable to similarly situated political subdivisions because the statute would apply to and provide benefit for every county that "fell" within the statutory definition. What was a necessary rule for the one would become a necessary rule generally applicable to everyone who might ever fall into the class's definition.

Respondents' arguments repeat what is not contested – that open-ended population-based classifications are presumed constitutional under the law before *Jefferson County*. But Respondents briefs fail to apply that standard to Chesterfield's arguments that the presumption is overcome by the existence of general laws that would achieve for St. Louis County what the special law also achieves – protection of revenues in the face of the expansion and creation of cities within the county. Thus, the issue is whether there was a reasonable basis for the Legislature in 1991 to conclude that the general laws already on the books permitting county sales taxes in Missouri (§67.505) and city sales taxes (§94.510) in Missouri (that some St. Louis County cities had already adopted prior to the 1977 and lost with the adoption of the

original §66.600) would have resolved the problems that St. Louis County believes were its alone.

Chesterfield's Point V suggests that there is no rational basis for this special law and argues that this Court can reach that conclusion for two reasons:

First, Chesterfields' argument does not implicate *Jefferson County*. Chesterfield asserts that §66.600 fails the reasonable basis test that pre-dates *Jefferson County* by decades.

Second, that if the Court concludes that the reasonable basis test permits §66.600 to stand even though it would most certainly fall under the current state of the law, then the Court should here adopt a new test that recognizes that (a) where the Legislature changes a previously open-ended population-based classification (b) to exclude a county that will soon qualify for the statute's application (c) to maintain exclusivity in a single county to which the statute applies, (d) a substantial justification test rather than a rational basis test ought to apply. This fact pattern exists here, has not been previously addressed and, as in *Jefferson County*, the party that brings the

case should prevail, even if the Court's decision does not reach back to other statutes.

Section 66.600 Fails the Rational Basis Test

The constitution forbids special laws "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." Mo. Const. art. III, §40(30).

In determining that a general law could not be made applicable, Respondents argue now and the trial court agreed that the effect of 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 [high] retail sales] to the detriment of high-population, low-retail cities [who had no sales tax whether or not they had high retail sales]." *Id.* at 3.

The trial court continued: "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." LFAppDoc176 at 3-4.

Would a general law applicable to all counties have resolved St. Louis County's revenue issues? Yes. All other Missouri counties are permitted to have dedicated sales taxes. *See*, §67.505 (permitting county sales taxes up to one-half of one percent coupled with an ad valorem levy reduction, with voter approval). Concerns for limitations on county revenue caused by annexation are negated by county-dedicated sales taxes because the county collects the tax everywhere in the county, even in the cities new and old. And §94.510 permits any city to have a dedicated sales tax, too. The existence of these authorizing statutes trips the trial court's rationales on simple logic.

The availability of general laws to achieve the revenue purposes sought by §66.600 shows that the passage of this special law for St. Louis County has no reasonable basis. The general law would achieve the same policy ends. This is enough to overcome the presumption of constitutionality of §66.600.

In amending §66.600 in 1991, the Legislature betrayed its purpose – that it wanted to pass a law that applied to St. Louis County alone, even if other counties fell into the category created by §66.600. As to this point, this defining-St. Charles-County-out-of-the-law act is simply additional evidence of the lack of a reasonable basis for the 1991 law. That additional proof – from the Legislature's own acts – substantiates the lack of a reasonable basis and overcomes the presumption of constitutionality.

But the enactment of the 1991 law shows that the rationale for the Court's reasonable basis test – that "others may fall into the classification" – is unsupportable as to §66.600. What the legislature thought was good for St. Louis County suddenly became something not good for St. Charles County even though it meet the statutory definition. Thus, the law was changed to assure exclusivity in St. Louis County – and that is definitionally a special law that violates §40(30).

Chesterfield Asks the Court to Adopt a New Test to Show Legislative Intent to Pass a Special Law Where a General Law Would Apply.

In 2006, *Jefferson County* determined that legislative intent ought to become part of § 40(30) analysis, essentially abandoning the naïve assumption that a remote chance of some other entity falling into a category was enough to find an open-ended, population-based statute constitutional. This intent analysis is now measured in two ways by the Court:

(A) where one political subdivision is targeted by a law even though others are similarly situated and the population targeted is so narrow that others are effectively excluded. When that occurs, the law can be sustained in a §40(30) challenge only if there is a substantial justification for the one-subdivision targeting because no general law would work. This is the teaching of *Jefferson County*.

(B) *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."

Both cases were applied prospectively only – but the party who advanced the argument that resulted in the law changing prevailed even if others could not.

This case advances a third way to measure legislative intent to create a special law: (C) Where the legislature advances an open-ended, population-based category that benefits a single political subdivision and then amends the statutory definition when another political subdivision meets the definition so as to disqualify the second political subdivision, the law should be presumed unconstitutional and can be sustained against a §40(30) attack only if there is a substantial justification for the law's continued application to a single political subdivision. It is a new test which, if adopted, ought to apply to this case.

Suppose for a moment that the real purpose of §66.600 was not revenue protection for St. Louis County but a passive aggressive method to terminate the right to annex/incorporate in County cities/citizens by adopting economic measure to disincentivize annexation/incorporation. The voiding of all city sales taxes by §66.600 serves that purpose admirably. But if annexation/incorporation was a problem for first-class counties "having a charter form of government and not containing a city with a population of four hundred thousand or more" (the 1977 version of the law), annexation/incorporation would be a problem for every county that met that

definition. The problem exists, one supposes, for every county with large unincorporated areas, multiple cities attracting economic development, and a growing population not dominated by a large city. This was St. Louis County. And in 1991 it was St. Charles County as well. Thus, diminishing the right of citizens to form cities to assure greater police protection, enhance fire protection, and the creation of communities of common interest governed by neighbors whose focus was that defined community to protect against annexation was inexplicably necessary in St. Louis County but unimportant in nearly identically situated St. Charles County.

This situation would not meet the reasonable basis test – and does not here. It surely would fail to meet the substantial justification test that ought to apply in this case. And because substantial justification shifts the burden, respondents have failed to meet it.

Section 66.600 violates §40(30). The trial court should be reversed.

IV.

Chesterfield's Point IV asserts that §66.620, which creates two classes -- Group A and Group B for purposes of both the collection from and the distribution to cities and St. Louis County – is a special law.

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 177, 184 (Mo. 2006)(emphasis added). The singling out of particular kinds of cities, rather than cities *qua* cities, creates a special law. Cities/non-cities is the natural class where cities are involved, not some cities vs. some other cities. *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").

Respondents assert that because §§66.600 and 66.620 operate across a single county, that §66.620 is a general law. Respondents simply ignore the fact the §66.620 is a distribution system that treats those in the natural class – existing cities – differently. "The vice in special laws is that they do not embrace all of the class to which they are naturally related." *Id.* at 184 (internal quotations omitted). "The question in every case is whether any appropriate object is excluded to which the law, but for its limitations, would apply." *Id.*

St. Louis County cities that had a sales tax prior to 1977 (Group A), lost the right to collect that tax under §66.620, but got to keep an amount equal to the tax as if they had not lost the ability to tax. Cities that had no tax in 1977 (Group B cities) received payments from the County under a formula mandated by §66.620. It did not matter how much county revenue was generated then (or now) by point-of-sale sales in one of these Group B cities. This status was frozen as of 1977.

As the trial court noted, the purpose of the distinction was, *inter alia*, permanently to preserve the point-of-sale status of the existing taxing cities. But that permanent preservation also denies point-of-sale's importance to

other cities and its reach in changing economic times. Whether one looks at this law based on existing cities or point-of-sale, it breaks natural classes apart to treat some in the class specially.

Respondents point out correctly that *Berry v. State*, 908 S.W.2d 682, 684 (Mo.1995) held that "the legislature…has the authority to designate, by general law, the distribution of county sales tax for local government purposes." The critical phrase is general law. But even if the Court finds that 66.600 is not a special law, the creation of disparate treatment within a natural class under §66.620 is not a general law as Respondents contend. A general law would treat all extant cities alike. A special law, as §66.620 is, treats extant cities differently. A general law would provide that the distribution of county tax funds would draw no distinction between cities based on immutable historic fact; §66.620 draws exactly that distinction. It is a definitionally special law. *Berry* offers no support for Respondents. Indeed, as Respondents/Intervenors admit: "the only distinction among cities is the amount of tax revenues they receive." Resp/Intervenor Br. at 54. That is a significant distinction that proves Chesterfield's point: §66.620 is a special law.

Section 66.620 is facially a special law.

The creation of classes based on immutable historic facts is definitionally a special law. §66.620 freezes classes based on whether a city existed in 1977 *and* levied its own sales tax. This is a closed classification that is the hallmark of a special law. "***Classifications based on historical facts***, geography, or constitutional status focus on immutable characteristics and are [not open-ended and] therefore ***facially special laws***." *State ex rel. City of Blue Springs v. Rice,* 853 S.W.2d 918, 921. (Mo.1993). The unconstitutionality of such closed-ended classifications is presumed. *Harris v. Missouri Gaming Commission,* 869 S.W.2d 58, 65 (Mo.1994).

There must be a substantial justification for a facially special law to survive a §40(30) attack claiming that a general law could have been applicable.

The burden of proving a substantial justification shifts to the party defending the law when a facially special law is attacked.

"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."

O'Reilly v. City of Hazelwood, 850 S.W.2d 96, 99 (Mo. 1993)(citations omitted).

Respondents argue that no general law would have raised additional revenue for St. Louis County, created a tax for cities that had no tax, and recognized the increased public safety burden of higher retail activity within existing cities. Resp/Interv.Br.at 55, fn.6. This supposed justification simply highlights the constitutional flaw in freezing classifications based on immutable facts. Since 1977, substantially higher retail activity exists in Chesterfield than existed forty years ago. Yet §66.620 does not permit Chesterfield to keep its point-of-sale taxes even though it is the home of higher retail activity now – the very justification that Respondents advance for the law-freezing status in 1977 and refusing to thaw it even in 2016.

A general law applicable to point-of-sale wherever it occurred would have reached a far more equitable result than the §66.620 formula. But this special law does not permit that because the point-of-sale rationale for the law in 1977 no longer supports the economic realities of 2018.

Chesterfield's opening brief also argues that other general laws would allow all of what §66.620 produces without pretending that nothing has changed since 1977 nor depending a point-of-sale as the essential rationale for the law. First, St. Louis County if 66.600 is gone, St. Louis County would be subject to §67.505, which permits the County have a stand-alone tax. Alternatively, if the law was truly general – at least for St. Louis County (a dubious proposition advanced by Respondents) -- St. Louis County could appropriate the money to cities annually, not have a statutorily-fixed appropriation by the County that favors certain cities over others.

Respondents have not met their burden of showing a substantial justification for the breaking of the natural class of cities – or of creating a general distribution system based on point-of-sale – or for simply letting the County make appropriations without the mandate of this interfering special law. A general law not freeze economic consideration permanently in 1977, but would permit treating all cities as part of a single class. *See*, Chesterfield Op.Br.at 36-38.

Respondents cite three cases supporting their claim that they meet the substantial justification test. First, *Union Electric Co. v. Mexico Plastic Co.*,

973 S.W.2d 170 (Mo.App.1998) involved a local ordinance that permitted a business one lifetime exemption from the city's business license tax. Mexico Plastics had qualified for a ten-year exemption before the city's new ordinance permitted new businesses a twenty-five-year exemption. Mexico Plastics sought to extend its exemption an additional twenty-five years.

The court of appeals did not find a "substantial justification" for the law, only an economic development justification. "[T]he record clearly demonstrates a justification for such a class." *Union Elec. at* 174. But even assuming that the court actually meant substantial justification, that justification was "to encourage manufacturers to locate in the City and to generally benefit the community at large. It was, therefore, important to balance the economic enticements offered to prospective business with sound municipal revenue." *Id.*

Here, there is no economic development opportunity. §66.620 is no more than a distribution scheme designed to assist St. Louis County at the expense of its cities, to curtail annexation/incorporation, again to protect the County's revenues and to protect the County from a revenue loss from which §67.505 would also protect it. The County does not exist to be protected. As

this Court has made clear in the annexation context, the function of both county and municipal government

> is to serve the general interests of these residents, not to engage in competition for the right to collect revenues, provide services and the like. The legislature has provided the residents with the means to assert their preferences for such entities. … the legislature's actions affirm the responsibility of government for the needs of those whom it serves, and not the needs of government in a continuing quest to serve itself.

City of Town & Country at 606.

Because it is closed-ended, §66.620 fails to account for changed economic circumstances, makes certain cities permanent beneficiaries of economic realities of 40 years ago, and makes other cities (the natural class) bear the burden of economic conditions of 40 years ago. No substantial justification exists for this special law, when the ends served by that statute could be served by a general law treating all cities alike or distributing the tax revenues based on point-of-sale. As Chesterfield has previously argued, only politics justifies this special law, not policy.

Second, *City of Sullivan v. Sites*, 329 S.W.3d 691, 694 (Mo. 2010), involved higher sewer connection fees to persons who had no sewer service prior to the passage of the ordinance. The claim that the law was a special law rested on geographic distinctions, not immutable historic facts. Those with new service were in a separate "class" because all of the new sewer service occurred in a defined area. The natural classes in Sullivan were those who had sewer service and those who did not. "The higher connection fees were imposed in a way that embraced all of the class to which the higher fees naturally related." *Id.* Additionally, "[r]esidents did not have the benefit of a sewer system prior to this. In return for the payment of the fee, residents now have the benefit of the system." *Id.* These two facts – natural classes and additional benefits that accrued only to one natural class was a sufficient substantial justification.

Again, breaking existing cities into two classes – and permanentizing point-of-sale based on immutable historic facts – cannot be justified on the basis of benefits denied similarly situated cities who face the higher costs of retail activity that has moved their way over 40+ years.

Finally, in *Board of Education of the City of St. Louis v. Missouri State Board of Education*, 271 S.W.3d 1, 10 (Mo.2008), the State established substantial justification for a facially special law by showing the law was passed to address "the long history of state-mandated, segregated schools ... the complexity of the issues, and the difficulty of developing a plan that will ensure that students of all races will have a continuing equal opportunity for a quality, integrated education."

No such substantial justification exists in this case. The general law that allows counties to impose sales tax, §67.505 and cities to do the same, §94.510 was in effect when the St. Louis County Sales Tax Law was repealed and re-enacted in 1983 and 1991 and each time §66.620 was reenacted to adjust the special formula that permanentized the special treatment of Group A cities. The existence of this general law defeats any claim of substantial justification for §66.620's special treatment of certain cities to the detriment of others.

Conclusion

Section 66.620 is a special law for which there is no substantial justification. It is unconstitutional in violation of §40(30).

VI.

Art. III, §40(21) forbids any special law "regulating the affairs of counties, cities, townships, election or school districts." There is no exception to this constitutional prohibition. If the law is a special law – that is, applies to but a single county and is closed-ended – and regulates the affairs of a county, it is unconstitutional whether there is a substantial justification for that law or not.

Chesterfield's Point VI asserts that §66.620, which mandates an apportionment formula for the distribution of St. Louis County revenues to St. Louis County cities and to no other county and to no other cities, violates §40(21).

The St. Louis County Sales Tax Law is a Special Law

Respondents argue that §§66.600 and 66.620 are not special laws. These statutes apply only to St. Louis County – alone among the other 114 counties of Missouri. The classes created by §66.620 are based on closed-ended criteria – here immutable historic facts. By every definition this Court has ever adopted, these statutes are special statutes – made even more so by the

Legislature's decision to make sure that St. Charles County could never fall into the statutes' classification.

For this Court to find that these are general laws would require the Court to change the controlling precedent. And while the Court certainly could do that, it is not warranted on this issue.

Section 66.620 Regulates the Affairs of St. Louis County

If §66.620 did not exist, would St. Louis County get to decide for itself how and to whom it would appropriate its sales tax revenues? Is appropriating sales tax revenues part of the essential business of any county? These questions, which Respondents simply do not answer, must be answered in the affirmative.

The voters never approved the distribution formula, only the imposition of the St. Louis County Sales Tax. Following that error, Respondents remarkably assert that the county sales tax is not county money! The law is called "The St. Louis County Sales Tax Law." All city sales taxes were abolished in 1977. Vendors deposit the sales tax revenue in the County Sales Tax Trust Fund. Every other county in Missouri gets its sales tax

revenues from that Fund and decides what to do with it without the aid of Jefferson City.

Berry, which Respondents repeatedly cite, concludes that the money raised under §66.600 is St. Louis County money—which can be distributed only under a general law – that is, a law that applies to every county. "The legislature…has authority to designate, by general law, *the distribution of county sales tax* for local government purposes." 908 S.W.2d at 684 (emphasis added). And 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* at 685.

The very act of appropriation is to determine who gets what from public funds. This is the very essence of county affairs – and the state taking over the appropriation right by statute is the very essence of an attempt to regulate county affairs. All of that would be acceptable if it applied to all counties, because §40(21) permits a general law that regulates county affairs. But §66.620 regulates only St. Louis County's affairs under a statute that

applies only to St. Louis County. And §40(21) says that no statute can do that when it focuses on a single county.

Art. III, § 40(21) is an absolute prohibition not subject to a substantial justification test

The substantial justification test adopted for §40(30) is not, as Respondents assert, a substantial justification for the policy adopted. Rather, the constitution requires a substantial justification for a special law because a general law would not be effective. This Court has not clearly stated this proposition, but numerous cases have alluded to it. See, for example, *Board of Education*, 271 S.W.3d at 10 (the State established substantial justification for a facially special law [as opposed to a law that applied generally] by showing the law was passed to address "the long history of state-mandated, segregated schools ... the complexity of the issues, and the difficulty of developing a plan that will ensure that students of all races will have a continuing equal opportunity for a quality, integrated education"). Section 40(30) not only permits but sanctions such a comparison. *See also City of Sullivan,* 329 S.W.3d at 694 (holding that the city had presented evidence of substantial justification for a sewer fee based on a particular location -- as

opposed to a generally applied sewer fee across the whole district -- because certain areas had benefited from previous sewer improvements).

Respondents' claim that *Board of Education* decides this issue is not supported by a careful reading of the case. The issue is simply not directly addressed. Indeed, while courts generally seek some flexibility in deciding constitutional issues, that flexibility must have a textual basis. Section 40(30) provides a textual basis for such flexibility; §40(21) grants no such leeway in the judiciary. This lack of flexibility in §40(21) arises because the vice of state representatives seeking special favors for their constituencies, and trading votes so that others can do the same for theirs, becomes completely untenable when state legislators have the leeway to overrule local government in the exercise of local government's core functions. Missouri's constitution and laws are formed around this concept: government that is closest to the people tends to serve the people best. Allowing a Jackson County legislator to determine how St. Louis County appropriates its funds – so that that legislator can get the St. Louis County legislators to vote for his/her control of Jackson County -- is exactly what §40(21) says cannot happen by special law.

Even if a Substantial Justification is Permitted in a §40(21) Challenge, Respondents Have Not Provided One.

Respondents assert that a law that fixes – from Jefferson City – exactly how St. Louis County appropriates its sales tax revenues is substantially justified because it is the only way to increase St. Louis County revenues, adopt a tax for cities that did not have one, and preserve point-of-sale distinctions. Leaving aside that this is all *political* necessity, not revenue or policy necessity, this argument does withstand drive-by logic.

St. Louis County can raise revenue and keep it all to itself if it does what every other county in the state does under §67.505. A city that does not want a tax but can provide services based on its historic ad valorem revenues, should not have to have a tax; a city that wants (or, for that matter, had in 1976) a city sales tax can have one under §94.510, and not be dependent on Jefferson City to devise a formula that always runs behind – sometime 40+ years behind – current and ever-changing economic conditions. And the point-of-sale argument fails because §66.620 essentially permanentizes the status quo in 1977, failing to recognize that point-of-sale has moved west, but its benefit has remained fixed.

All this is antithetical to notions that government close to the people can react to changes more quickly, more accurately, and more sensibly than the Legislature can – a Legislature that is charged with making laws for a state and expressly forbidden from regulating the affairs is single counties.

Conclusion

Sections 66.600 (to the extent it cannot be severed) and 66.620 violate art. III, §40(21).

I.

Chesterfield's Point I shows that the trial court erred in finding that res judicata bars this litigation. This issue is controlled by *Healthcare Services of the Ozarks, Inc., v. Copeland*, 198 S.W.3d 604, 612 (Mo.2006)(emphasis added). "Res judicata prevents a party from relitigating facts or questions that have been settled *by judgments on the merits* in a previous action." *Id.* (emphasis added).

Respondents' argument that res judicata applies to this case rests on this premise: That Chesterfield's appeal to the Administrative Hearing Commission in 1990 included a claim that §§66.600-.620 were special laws; that the AHC decided that issue against Chesterfield; that Chesterfield did not appeal that decision; that it became final as to Chesterfield because Chesterfield did not appeal that portion of the AHC decision; and that unappealed AHC decisions become decisions on the merits.

The Petition for Review filed in this Court and decided as *Chesterfield v. Director of Revenue*, 811 S.W.2d 375 (Mo.1991)("*Chesterfield I*"), only addressed equal protection claims and claims raised for the first time on appeal.

Respondents spin a terrific yarn from this premise – but the premise is false and the yarn is a myth.

The AHC decision is attached as Appendix A-1.

Here is what the AHC decision said:

> Chesterfield seeks to become a group A city. It does not argue that the Director's decision [that §66.620 prohibited the Director from treating Chesterfield as a Group A city] was contrary to the statute. It [Chesterfield] agrees that it was [required by the statute]. Rather, Chesterfield argues that the provision of 66.620…requiring certain cities to remain in group B, and the Director's order executing this provision, is arbitrarily and irrationally discriminatory in contravention of the equal protection and due process clauses of the United States Constitution, and the equal protection, due process and equal rights and opportunities clauses of the Missouri Constitution.
>
> … The question then is whether §66.620…is constitutional….

> We cannot determine this question. We do not have authority to consider a challenge to a statute….Only the judiciary can set aside a statute on grounds on unconstitutionality….
>
> We conclude that we do not have jurisdiction to disregard §66.620….We, therefore, deny Chesterfield's application.

App. A-1.

The AHC decision makes clear that neither a §40(30) nor a §40(21) challenge was before that administrative body. Indeed, what Chesterfield sought there – Group A status despite the statutory directive that Chesterfield could not be a Group A city – is not what Chesterfield wants here at all. Chesterfield seeks this Court's decision that §66.620 is constitutionally infirm and that the Group A/B distinction must fall altogether.

As shown in Chesterfield's opening brief, *Chesterfield I* was not a judgment on the merits. It was a decision dismissing the petition for review on procedural grounds. "As intriguing as [the questions presented] may be, the answers must await another day." *Chesterfield I*, 811 S.W.2d at 377.

While this is another day, it is also a new day. None of the issues at stake at any level of *Chesterfield I* are before the Court in this case.

The trial court's error in entering judgment based on *res judicata* grounds must be reversed.

II.

Chesterfield's Point II asserts that the trial court erred in concluding that judicial estoppel and/or equitable estoppel precluded the constitutional challenges Chesterfield advances in this case.

Judicial Estoppel Does Not Apply Here

Respondents argue that because Chesterfield supported the constitutionality of §66.620 in *Berry* against an attack by Group A cities challenging the Law on several grounds not at issue in this case, Chesterfield cannot now challenge §§66.600-.620 on other grounds never addressed in *Berry.*

Berry was decided in 1995 — 23+ years ago. The Legislature amended §66.620 in 2016. The economics of the County have changed dramatically in that more-than-two-decades. Chesterfield is an economic success story and a substantial net exporter of sales tax revenues to the rest of the County.

Chesterfield's operative petition challenges the 2016 amendments. Chesterfield believes that the 2016 amendments are injurious to its economic interests.

Leaving aside this fact – that the law is different -- judicial estoppel would not apply even had the law not been amended. Judicial estoppel turns on specific claims asserted and finally decided, not arguments offered by a party unrelated to the issues raised by a party opponent and decided by the court.

Stated simply: "Judicial estoppel applies [a] to prevent litigants from taking a position in one judicial proceeding, [b] thereby obtaining benefits from that position in that instance and later, [c] in a second proceeding, taking a contrary position [d] in order to obtain benefits from such a contrary position at that time." *Besand v. Gibbar,* 982 S.W.2d 808, 810 (Mo.App.E.D.1998). The positions taken must be "clearly inconsistent." *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001). Further, judicial estoppel is about protecting the integrity of the judiciary. The doctrine avoids "judicial acceptance of an inconsistent position in a later proceeding [that] would create "the perception that either the first or the second court was misled…." *Id.*

(a) The *Berry* court never considered whether §66.620 violated §§40(21) and/or 40(30). Its statements in *Berry* are simply not inconsistent

with the position it takes here. The constitutional provisions at issue here were not in that case. The first court could not have been misled – and neither could the second court have been misled. Chesterfield was and is talking about two different issues.

(b) Chesterfield obtained no benefits from *Berry* as a result of any position it took there. It got what it would have gotten had it not intervened.

(c) Chesterfield has not taken a contrary position on the issues advanced in this case.

(d) If Chesterfield prevails in this case, it will not have been as a result of the decision in *Berry* or on the reliance of any party in *Berry*.

Respondents' repeated assertions that Chesterfield's arguments as an intervenor attempting to support the Law on *some* grounds means that Chesterfield necessarily asserted that the Law was constitutional on *every* ground misunderstands judicial estoppel.

Equitable Estoppel

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).

Neither St. Louis County, the Director of Revenue, nor any city in the County relied on Chesterfield's position in *Berry* to their detriment. They did not stop collecting the tax, distributing the funds under the §66.620 formula, nor do anything different than they would have done had Chesterfield remained silent. Prejudice is wholly absent.

Chesterfield received funds that it was entitled to under the formula, not because Chesterfield convinced anyone to do so, but because the Law required it. But Chesterfield also did not receive all the funds to which it would have been entitled had point-of-sale been in place for it – or if it could have had its own dedicated sales tax as can every city in Missouri except those in St. Louis County.

Respondents act as if Chesterfield was the critical component of the defense of the Law in *Berry.* Chesterfield was a small voice in a large chorus in *Berry* – and everyone was signing a different song in that case. It is almost comical for Respondents now to assert that anything Chesterfield said or did

in that litigation caused Respondents to change their position in *Berry* to Respondents' detriment.

Conclusion

The trial court erred in finding that judicial or equitable estoppel applied in this case. On these grounds it should be reversed.

III.

Chesterfield's Point III asserts that the trial court erred in concluding that laches barred this action.

Chesterfield's Petition seeks no equitable relief. Rather, it seeks a declaratory judgment that §66.600 - .620 violate the Missouri Constitution. Chesterfield's opening argues that laches does not apply to legal action, only equitable actions. Respondents say that this is wrong.

The general rule is that an "action pursuant to the Declaratory Judgment Act is *sui generis,* neither legal nor equitable." Courts sometimes say that the cases are treated as equitable actions, but that equitable treatment properly occurs only when an equitable remedy is sought.

> An action for a declaratory judgment is sui generis, and whether an action is to be treated as one at law or one in equity is to be determined by the nature of the dispute. The test is whether, in the absence of a prayer for declaratory judgment, the issues presented should be properly disposed of in an equitable as opposed to a legal action. Where no equitable relief is sought in

an action for declaratory judgment, the action is to be treated as one at law.

22A Am. Jur. 2d Declaratory Judgments § 2.

This is an action seeking a declaration of legal, not equitable rights. Laches does not apply.

Even were this not the law – and the Court were to determine that this is an action to which laches could apply – laches would still not be proper here. As previously expressed in this brief and in Chesterfield's opening brief, neither the State, St. Louis County nor cities in the County have suffered disadvantages by Chesterfield bringing its operative petition only after the last amendment to §66.620. Chesterfield has been a net exporter of revenue to the County. The only disadvantage resulting from the delay in filing this case was all Chesterfield's. No party changed its position, refrained from doing any act permitted under the statute, or otherwise suffered any detriment because this action came when it did. Or because it relied on a promise never made by Chesterfield that it would not find some basis to challenge the constitutionality of the Law. Indeed, the Law has been

variously attacked since its inception by Chesterfield and parties other than Chesterfield.

Mere delay, unaccompanied by prejudice or disadvantage to a party opponent, will not be sufficient for laches to apply. *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)).

Conclusion

The trial court erred in concluding that laches barred this action. It should be reversed.

Respectfully submitted,

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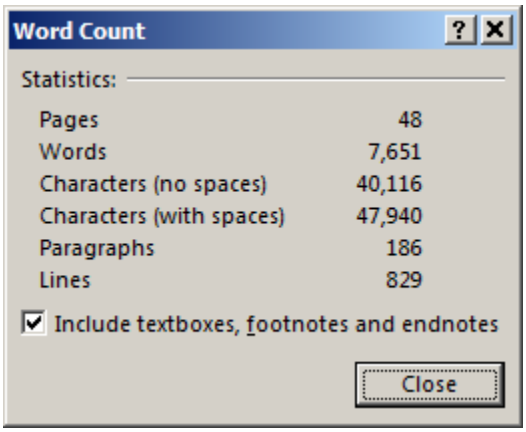
CERTIFICATE OF COMPLIANCE

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 7,651 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.



/s/ Edward D. Robertson, Jr.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of this Reply Brief and Appendix was served on registered counsel via the Missouri Courts E-filing System on August 10, 2018.

/s/ Edward D. Robertson, Jr.