SC97653

IN THE SUPREME COURT OF MISSOURI

CITY OF CRESTWOOD, et al.,

Plaintiffs-Appellants,

vs.

AFFTON FIRE PROTECTION DISTRICT, et al.,

Defendants-Respondents.

Appeal from the Circuit Court of Cole County, Missouri
The Honorable Jon E. Beetem, Circuit Judge, Division 1
17AC-CC00281

APPELLANTS' SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS & STATUTES

POINTS[1] RELIED ON

I. The trial court erred in granting judgment for Respondents, ruling that § 72.418, RSMo. is not a special law because it violates Mo. Const. art. III, § 40(30) in that its real effect is to apply only to cities in St. Louis County and their inhabitants in perpetuity and subject them to a different set of statutes than those governing similarly situated cities in other counties.

Standard of Review

"Because a judgment on the pleadings addresses an issue of law, our review is *de novo*…." State ex rel. Kansas City Symphony v. State, 311 S.W.3d 272, 274 (Mo. App. W.D. 2010). Review of denial[2] of summary judgment is "essentially de novo, as the propriety of summary judgment is an issue of law." Stanley v. City of Independence, 995 S.W.2d 485, 486 (Mo. banc 1999).

Argument

Under the new standard announced by this Court, § 72.418.2 is a special law, and the trial court erred in granting judgment for Respondents. On December 24, 2019, this Court published City of Aurora v. Spectra Communications Group, LLC, SC96276 and City of Chesterfield v. State of Missouri, SC96862. These cases dramatically altered the standard under which this Court evaluates laws alleged to violate Article III, § 40.

A prohibition on special laws has existed in Missouri's Constitution since 1865. Article III, § 40(30) states that 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." While the standard for evaluating special laws set forth in Jefferson County Fire Prot. Districts Ass'n. v. Blunt, 205 S.W.3d 866, 869 (Mo.

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1 To the extent not inconsistent with this Brief, Appellants incorporate by reference Appellants' Brief filed on April 15, 2019, and the Reply Brief filed on July 1, 2019.

2 While denial of a motion for summary judgment is ordinarily not reviewable, an exception exists where parties file dispositive cross-motions which are inextricably intertwined such that denial of one motion amounts to granting of the other, and vice versa. This exception is applicable here as noted in Appellants' Brief, pgs. 9-10. *See* Seay v. Jones, 439 S.W.3d 881, 887 (Mo. App. W.D. 2014).

banc 2006), has been abrogated, Jefferson County's recitation of the evils of special legislation remains relevant. In Jefferson County, this Court recounted the history of special legislation prior to its prohibition as follows:

> There were numerous problems with special legislation. The amount passed was so voluminous that individual legislators could not have taken more than a cursory look at each bill, and it was often hastily and sloppily drafted. Special legislation took away from the time legislators spent on needed general legislation. Instead, the legislators spent their time engaged in the practice of logrolling, whereby a legislator could count on other legislators to vote for his special legislation in return for him voting for their special legislation. Any legislator who dared challenge a particular piece of special legislation risked ostracism. And since the legislation did not apply to any other legislators' districts, the other legislators did not consider the merits of the legislation. Indeed, an individual legislator during that time period had exclusive powers with regard to every matter of legislation that affected his county and the people in it. The prevalence of special legislation led to extremely powerful lobbyists and sometimes outright corruption. The general public seldom received notification of pending special legislation and generally learned of it only after it was enacted.

205 S.W.3d at 869 (internal citations omitted).

The test in Chesterfield and Aurora focuses solely on whether a statutory classification has a rational basis. In Aurora, this Court stated:

> [E]very law is entitled to a presumption of constitutional validity in this Court, and if the line drawn by the legislature is supported by a rational basis, the law is not local or special and the analysis ends. If the classification is not supported by a rational basis, the threshold requirement for a special law in section 40 is met and the party challenging the statute must then proceed to show the second element: either that the law offends one of the specific subject matter prohibitions in subdivisions (1) through (29) of section 40, or that the law is one 'where a general law can be made applicable' under subdivision (30). Of course, subdivision (30) states that '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.' But this requirement does not change the fact the law will be presumed constitutional and the burden of showing both elements ordinarily resides with the party challenging a statute under article III, section 40.

*9. (Mo. banc Dec. 24, 2019). "'Under rational basis review, this Court will uphold a statute if it finds a reasonably conceivable state of facts that provide a rational basis for the

classifications.' Identifying a rational basis is an objective inquiry that does not require unearthing the legislature's subjective intent in making the classification." Id. at *11 (internal citations omitted). "Rational-basis review does not question 'the wisdom, social desirability or economic policy underlying a statute,' and a law will be upheld if it is justified by any set of facts. Instead, rational-basis review requires the challenger to 'show that the law is wholly irrational.'" Amick v. Dir. of Revenue, 428 S.W.3d 638, 640 (Mo. banc 2014) (internal citations omitted).

Section 72.418.2[3] creates an unnatural classification which lacks a rational basis. It divides cities into two subclasses: (1) cities within St. Louis County, which are burdened by § 72.418.2; and (2) cities in all other counties, which are not so burdened. Alternately, the statutes create another subclassification: (1) fire protection districts in St. Louis County, which § 72.418.2 insulates from the effect of annexation; and (2) fire protection districts in all other counties.

All cities in Missouri have the ability to engage in annexation. However, the effect of an annexation of territory served by a fire protection district varies depending on which county such city is within. If such city is within St. Louis County, § 72.418.2 provides that the fire protection district shall continue to serve the annexed area, and shall no longer levy taxes therein, but shall receive an annual payment from the city to compensate it for the amount of property tax it would have levied. If such city is not within St. Louis County, § 72.418.2 is not applicable and the more favorable procedures in § 321.322.1 apply.

There is no rational basis for this arrangement, particularly because fire protection districts in St. Louis County already enjoy greater protections from annexation through the Boundary Commission Act, §§ 72.400 – 72.430, which makes annexation far more difficult in St. Louis County. This renders any protection provided by § 72.418.2 (which was not

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[3] Section 72.401.1, RSMo limits § 72.418 to cities within "any county with a charter form of government where fifty or more cities, towns and villages have been established, if the governing body of such county has by ordinance established a boundary commission…." It is undisputed that these criteria apply only in St. Louis County.

originally included within the Boundary Commission Act) redundant. The Boundary Commission Act provides that the Commission must find "that the boundary change will be in the best interest of the municipality or municipalities and unincorporated territories affected by the proposal and the areas of the county next to such proposed boundary," and must consider "the impact on the tax base or on the ability to raise revenue, of such proposal" as well as the proposed level of fire protection service to the area to be annexed, and the "extraordinary effect the boundary change will have on the distribution of tax resources in the county…." § 72.403.3, RSMo. Thus, there is an adequate mechanism to protect against disruptions to tax bases or fire protection services without the redundant restriction of § 72.418.2.

Respondents refer to an affidavit from Dr. T.R. Carr submitted in response to Appellants' motion for summary judgment to show a rational basis. Respondents' Brief, pgs. 10-11; D28. Dr. Carr asserts that "[n]o other Missouri county faces, on an ongoing basis, the challenges presented by municipal annexation to the extent that St. Louis County does." D28, p. 4. Even if true, this might form a rationale to establish a boundary commission empowered to reject opportunistic or unwise annexation efforts. But it would not justify a statute that merely governs the *post-annexation* power dynamic. Section 72.418.2 does nothing to *prevent* an annexation. It simply insulates the fire protection district from a loss in tax revenue resulting from annexation. Respondents cite no reason why the fire protection districts in St. Louis County could not be governed by § 321.322.1 or why cities are not fully capable of providing fire protection service to areas which they have lawfully annexed.

This Court must consider the purpose of a statute in determining whether the classification it makes is rational. It is not enough to say "County X is unique because …, therefore the General Assembly is justified in excluding it from laws applicable to the rest of the state." The evil to be remedied must reasonably relate to the classification made. Otherwise, the General Assembly would be free to subdivide the state into hundreds of mini-states, each with their own special laws dictated by politicians in Jefferson City instead of city councils, and justifiable by the thinnest of post-hoc rationalizations. This

would be inconsistent with State v. Julow, 31 S.W. 781, 783 (Mo. banc 1895), in which this Court stated:

> Every one has a right to demand that he be governed by general rules, and a special statute which, without his consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free government.

Internal citations omitted. "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." Id. (internal citations omitted). Here, any purported justification for § 72.418.2 must grapple with the question of whether the consequence of the statutory classification serves its purported purpose.

Because there is no rational basis for the classification made by § 72.418.2 the first element[4] of the Aurora test is satisfied. Because a general law (§ 321.322.1) could be applicable within St. Louis County, § 72.418.2 is unconstitutional.

[4] Aurora indicates that once a statute has been determined to be local or special, one looks at subsections (1) through (30) of Art. III, § 40 to determine if the statute is unconstitutional. *9. However, the statutes at issue here fail – irrespective of subsections (1) through (30) – because the bills enacting these statutes failed to comply with Art. III, § 42, requiring that the bills enacting these statutes include proof of publication of notice in the affected jurisdictions. *See* Appellants' Brief, pgs. 41-42, 61.

II. The trial court erred in granting judgment for Respondents, ruling that § 72.418, RSMo. is not a special law because it violates Mo. Const. art. III, § 40(21) in that it is a special law that regulates the affairs of Crestwood by preventing it from enforcing its ordinances in part of the City and by inhibiting its ability to provide or negotiate for fire protection services.

Standard of Review

"Because a judgment on the pleadings addresses an issue of law, our review is *de novo*…." Kansas City Symphony, 311 S.W.3d at 274. Review of the trial court's decision denying Appellants' motion for summary judgment is "essentially de novo, as the propriety of summary judgment is an issue of law." City of Independence, 995 S.W.2d at 486.

Argument

Section 72.418 is an unconstitutional special law that regulates the affairs of cities in St. Louis County. Under Aurora, once a statutory classification is determined to lack a rational basis, the statutes are local or special and the Court's attention then turns to the subsections of Art. III, § 40. Subsection (21) prohibits special laws that "regulat[e] the affairs of counties, cities, townships, election or school districts." As noted in Appellants' Brief (pgs. 50-53), §§ 72.418.2 and 321.322.3 regulate the affairs of Crestwood by depriving the City of the ability to determine how best to provide fire protection service to a significant portion of the City. Cities in all other counties have the ability to provide service to annexed areas by their own municipal fire department, by retaining the fire protection district's services, by contracting with neighboring communities, or private fire protection service. Crestwood arguably cannot enforce its fire protection ordinances as to non-commercial property within the annexed area, a limitation not applicable to cities outside St. Louis County.

Because §§ 72.418 imposes restrictions on the powers of the City, and such restrictions are not applicable to cities in other counties, this statute is a special law regulating the affairs of cities in St. Louis County and is unconstitutional.

III. The trial court erred in granting judgment for Respondents, ruling that § 321.322.3 is not a special law because it violates Mo. Const. art. III, § 40(30) in that its real effect is to apply only to cities in St. Louis County and their inhabitants in perpetuity and subject them to a different set of statutes than those governing similarly situated cities in other counties.

Standard of Review

"Because a judgment on the pleadings addresses an issue of law, our review is *de novo*…." Kansas City Symphony, 311 S.W.3d at 274. Review of the trial court's decision denying Appellants' motion for summary judgment is "essentially de novo, as the propriety of summary judgment is an issue of law." City of Independence, 995 S.W.2d at 486.

Argument

Section 321.322.1 provides that an annexing city and the fire protection district may agree for the city to assume service and purchase the district's assets in the annexed area, or to have a five-year drawdown period in which the district annually receives a diminishing share of the property tax revenue it would have received. Alternately, the city can "negotiate contracts with a fire protection district for mutually agreeable services." § 321.322.1. Cities in St. Louis County are denied these options, and cannot take advantage of the drawdown period, because § 321.322.3 provides that the "provisions of this section shall not apply in any county of the first class having a charter form of government and having a population of over nine hundred thousand inhabitants." St. Louis County is the only county with over 900,000 inhabitants. Because § 321.322.3 gives fire protection districts in St. Louis County the ability to receive tax revenue from annexed territory in perpetuity, they enjoy a benefit that is denied to fire protection districts in the rest of the state (which have, at most, a five-year period in which they receive tax revenue). Likewise, cities in St. Louis County are excluded from § 321.322.1, and are instead subject to the burdensome provisions of § 72.418.2. These statutes are local or special laws where a general law could be made applicable and are thus unconstitutional.

Subsection (30) establishes a constitutional preference for general laws, permitting local or special laws *only* where a general law *could not* be made applicable. Respondents have presented no reason why the general law applicable to the rest of the state –

§ 321.322.1 – could not be made applicable within St. Louis County. Even if one posits that St. Louis County is unique due to its history of annexation or due to the characteristics identified in Chesterfield (large population, lack of central city, 90+ municipalities, large unincorporated area), § 321.322.3 does nothing to alleviate any problems associated with St. Louis County's unique features and challenges. Similarly, the statutes at issue in Chesterfield continue to apply in St. Louis County and serve as a disincentive to opportunistic annexation and to more equitably distribute tax revenue. Furthermore, there is nothing before this Court indicating that fire protection service in St. Louis County would be adversely impacted if municipalities assumed fire protection service. Stated differently, there is nothing to suggest that service provided by fire protection districts is superior to that provided by municipalities, or that the transfer of power contemplated by § 321.322.1 would be problematic for St. Louis County. The citizens in all other counties are free to respond to changing circumstances to determine how best to provide services to their communities, and citizens in St. Louis County deserve the same rights.

This case is distinguishable from Aurora and Chesterfield. In Aurora, this Court considered whether § 67.1846.1 was an invalid special law. Section 67.1846.1 permits "grandfathered political subdivisions" to "enact[] new ordinances, including amendments of existing ordinances, charging a public utility right-of-way user a fair and reasonable linear foot fee or antenna fee or from enforcing or renewing existing linear foot ordinances for use of the right-of-way…." *9. A "'grandfathered political subdivision' is any political subdivision which has, prior to May 1, 2001, enacted one or more ordinances reflecting a policy of imposing any linear foot fees on any public utility right-of-way user…."

This Court found that the classification made by § 67.1846.1 was supported by a rational basis because the "grandfathered" cities had foregone other revenue sources, which would not be recovered but for § 67.1846.1. Id. at *22. "This provision was a rational effort by the legislature to impose a new policy without disrupting the reasonable reliance of those that acted lawfully before the change in policy. Therefore, section 67.1846.1 is not a special law." Id.

Unlike in Aurora, the General Assembly was not establishing a new policy to apply throughout the state by enacting §§ 72.418.2 and 321.322.3. Instead, these statutes carve out cities in St. Louis County from the general law applicable to the rest of the state (§ 321.322.1). Section 72.418 imposes a more onerous burden on cities in St. Louis County, and affords privileges to fire protection districts in St. Louis County not available to other fire protection districts. There is no rational basis for this arrangement, in which most cities in the state can determine whether annexed areas would best be served by itself, by a fire protection district, or by some other means, and in which cities in St. Louis County are deprived of these options.

Likewise, this case is distinguishable from Chesterfield. First, Chesterfield addressed only one set of statutes – §§ 66.600 and 66.620, RSMo – creating a unique tax distribution scheme tailored to St. Louis County. No comparable statutes provide a different tax distribution system tailored to other counties. Stated differently, in Chesterfield, there is no general law from which cities in St. Louis County are carved out. Here, cities in St. Louis County are statutorily carved out of § 321.322.1, the general law. Unlike in Chesterfield, there is one general statute applicable statewide (except for St. Louis County) to govern the relationship between an annexing city and a fire protection district. Then there is another special statute – § 72.418.2 – which creates a burden on annexing cities in St. Louis County. Every fire protection district in the State outside of St. Louis County is expected to manage its affairs in light of the possibility of annexation by a municipality, and § 321.322.1 provides a workable framework to manage the transition. No rationale has been provided as to why fire protection districts in St. Louis County must be afforded this unusual privilege, which creates an unsustainable burden on cities in St. Louis County.

Secondly, because the laws at issue in Chesterfield and those at issue here address materially different issues, consideration of certain factors that may make St. Louis County unique when considering the division of sales taxes between municipalities do not justify treating municipalities in St. Louis County differently from municipalities in all of the other counties when it comes to providing fire service. Section 66.600 permits counties with a

population[5] of over 900,000 to establish a county-wide sales tax, and creates a unique mechanism to distribute the tax throughout the county's municipalities and unincorporated areas. Chesterfield at **2-3. Section 66.620 groups cities in St. Louis County into Group A and Group B, and provides differing formulas to distribute revenue to the groups. Id. at *3.

The State contended that § 66.600 was supported by a rational basis "because St. Louis County, unlike other counties in the state, has a large population, lacks a central city, has 90 separate municipalities within its borders, and has a large, unincorporated area. The state further … noted St. Louis County is responsible for providing municipal-type services, such as police, street maintenance, and zoning, to the unincorporated areas while simultaneously providing county-type services, including court systems, jails, and roads, to the county as a whole." Id. at *7. This Court held that "[g]iven St. Louis County's distinctive features and responsibilities, section 66.600's applicability to only St. Louis County by operation of its population classification is supported by a rational basis. Because there are reasonably conceivable facts that provided a rational basis for the classifications in section 66.600, the statute is not a special law…." Id.

The Court also held that § 66.620's classification of cities into Group A and Group B was supported by a rational basis. The State defended the classification based on "'the need for predictable and sound revenue streams that benefit the residents of Group B and provide significant percentages of the funding for services that benefit all county residents.' Second, the state contended section 66.620's distribution scheme 'discourages opportunistic behavior such as annexations or gerrymandering that are primarily or solely motivated by the sales tax distribution formulas in effect at a particular time.'" Id. at *8. This Court held that "[w]hile the need for predictable revenue streams for cities may not be unique, the circumstances of St. Louis County noted in the prior point are unique. Within the circumstances of St. Louis County, the criteria for section 66.620's Group A and B

[5] When enacted in 1977, the population threshold was 400,000. The threshold was raised to prevent St. Charles County from becoming subject to the statute as it grew.

classifications reasonably serve the state's legitimate interest in providing stable revenue sources for Group B cities and discouraging opportunistic annexations." Id. at *9.

While, on its face, the rationale relied upon in Chesterfield (St. Louis County's large population, lack of central city, 90+ municipalities, large unincorporated area, history of opportunistic annexation) could arguably be applicable here, there is a crucial difference. The statutes in Chesterfield served to create a county-wide taxation system centrally managed by St. Louis County to provide predictable revenue streams throughout the county. Section 66.600 and 66.620 were tailored to address the unique characteristics of St. Louis County and to mitigate a problem exacerbated by those characteristics.

Here, this rationale is inapplicable because fire protection districts operate independent of the government of St. Louis County. St. Louis County does not derive tax revenue for fire protection from the unincorporated areas, nor does it provide fire protection service. Instead, the numerous fire protection districts levy taxes to provide service within their boundaries. Fire protection districts are independent political subdivisions. *See* § 321.100, RSMo. St. Louis County itself is unaffected by whether a lawfully annexed area is served by a fire protection district or a municipality. The decentralized nature of St. Louis County, and its unique role in providing county and municipal services, is not affected because it is not responsible for fire protection service. Respondents have identified no interest in whether service is provided to annexed territory by a municipality or a fire protection district. While an annexation might deprive St. Louis County of revenue, St. Louis County is not impacted by whether an unincorporated area that has been annexed by a municipality remains served by a fire protection district or by a municipality. Under either scenario, St. Louis County has no responsibility for fire protection service and derives no revenue for such purposes from the annexed area. Respondents have not articulated why St. Louis County's history and characteristics dictate that fire protection districts must retain their service areas (and ability to extract tax revenue) in perpetuity, and why the drawdown period in § 321.322.1 could not be applicable.

The new test announced in Aurora and Chesterfield is essentially the same test this Court previously applied for statutes which were not *facially* special (i.e., based on open-

ended characteristics). *See* Treadway v. State, 988 S.W.2d 508, 511 (Mo. banc 1999) ("Furthermore, '[o]nly where the statutory classification is arbitrary and without a rational relationship to a legislative purpose has this Court found a law founded on open-ended criteria unconstitutional.' Under the rational basis test, the legislature is afforded broad discretion in attacking societal problems, and the challenger bears the burden to show that the law is wholly irrational." Internal citations omitted). Prior to Aurora, this Court has invalidated statutes as special laws because the classifications created by statute were not supported by a rational basis.

In School District of Riverview Gardens v. St. Louis County, 816 S.W.2d 219 (Mo. banc 1991), this Court invalidated a statute because the classification made by the statute at issue lacked a rational basis. Riverview Gardens involved a statute (§ 137.115.1(2)) permitting most[6] political subdivisions to revise their tax levies after "'implementation of an assessment and equalization maintenance plan.'" 816 S.W.2d at 220. However, political subdivisions within St. Louis County and the City of St. Louis could only revise their tax levies after voters approval and if the consumer price index had not risen more than five percent. Id. This Court found that "this classification bears no rational relationship to procedures for tax levy adjustments following reassessment. Indeed, for purposes of tax levy adjustment, there is no rational argument which explains the conspicuous absence of the Kansas City metropolitan area from the statute's exclusions." Id. at 222. "It is readily apparent that the procedures for reassessment imposed generally under Section 137.115.1(2) could apply equally well to the political subdivisions located in St. Louis County and of the City of St. Louis. As we have previously stated, no rational basis exists for the disparate treatment accorded St. Louis County and the City of St. Louis in Section 137.115.1(2). Thus, the constitutional prohibition of Article III, section 40(30), is violated by the legislative adoption of a special law where a general law could be made applicable." Id.

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[6] Though this Court in Riverview Gardens determined the statute was based on closed characteristics, the Court applied the rational basis test.

Here, a general law applies statewide – § 321.322.1. The General Assembly carved cities in St. Louis County out of this statute through subsection 3 and created a new special statute – § 72.418.2 – to impose more onerous conditions on cities in St. Louis County. Therefore, § 321.322.3 is a special law and a general law could be made applicable.

Conclusion

For the reasons set forth herein, Appellants pray that this Court declare that §§ 72.418.2 and 321.322.3 are unconstitutional, reverse the trial court's judgment, sever these statutes from Chapters 72 and 321, RSMo, and enjoin their enforcement. In the alternative, Appellants pray that this Court remand this case for reconsideration in light of Aurora and Chesterfield.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND CERTIFICATE OF COMPLIANCE WITH RULE 55.03(a)

The undersigned counsel hereby certifies that on January 24, 2020, the foregoing was filed electronically with the Clerk of Court to be served by operation of the Court's electronic filing system upon all counsel. In addition, the undersigned counsel certifies under Rule 55.03(a) of the Missouri Rules of Civil Procedure that he has signed the original of this Certificate and the foregoing pleading.

/s/ *James C. Hetlage*

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief includes the information required by Rule 55.03 and complies with the requirements contained in Rule 84.06. Relying on the word count function of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 4,988, excluding the cover, signature block and certificates of service and compliance.

The undersigned further certifies that this electronic brief was scanned for viruses and found to be virus-free.

/s/ *James C. Hetlage*