IN THE SUPREME COURT OF MISSOURI

No. SC88559

ED TAYLOR,

Appellant,

v.

STATE OF MISSOURI, *et al.*

Respondents.

Appeal from the Ste. Genevieve County Circuit Court
The Honorable Kenneth W. Pratte, Judge

BRIEF OF RESPONDENTS STATE OF MISSOURI, STE. GENEVIEVE COUNTY, AND STE. GENEVIEVE COUNTY SHERIFF

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Jurisdictional Statement

This Court has exclusive appellate jurisdiction in all cases involving the validity of a state statute. MO. CONST. art. V, § 3. But the constitutional challenge must be real and substantial; if it is merely colorable, then jurisdiction lies in the court of appeals. *Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47, 51 (Mo. banc 1999); *Hilburn v. State*, 226 S.W.3d 859, 862 (Mo. App. W.D. 2007). A constitutional challenge is real and substantial when

> upon preliminary inquiry, the contention discloses a contested matter of right, involving some fair doubt and reasonable room for controversy; but, if such preliminary inquiry discloses the contention is so obviously unsubstantial and insufficient, either in fact or law, as to be plainly without merit and a mere pretense, the claim may be deemed merely colorable.

*Hilburn,*226 S.W.3d at 862.

"Stated another way, a claim is real and substantial if it presents an issue of first impression." *Id. See also State v. Newlon,* 216 S.W.3d 180, 185-186 (Mo. App. E.D. 2007)(same).

In *Newlon*, the court of appeals determined that it had jurisdiction of an appeal, where this Court had, in a prior case, opined as to the constitutionality of a jury instruction and described how such an instruction must be framed so as

to pass constitutional muster. *Id.* The appellant's claim regarding the instruction, then, was not an issue of first impression and the constitutional challenge was not an issue of first impression. *Id.* Because the constitutional challenge was not real and substantial, but merely colorable, the court of appeals had jurisdiction of the appeal. *Id.*

Likewise here, this case is not a matter of first impression. This Court has already opined regarding a Hancock challenge to the now-repealed statute that Mr. Taylor challenges here, in *Brooks v. State,* 128 S.W.3d 844, 851 (Mo. banc 2004). Mr. Taylor acknowledges as much. Appellant's Brief, p. 11. His attempt to draw a distinction between the instant case and *Brooks*, describing his case as an "as applied" challenge, Appellant's Brief, p. 8, only serves to further demonstrate that his constitutional challenge is not real and substantial, merely colorable.

Therefore, the Court of Appeals, Eastern District, has jurisdiction of this appeal and the matter should be transferred to that court. MO. CONST. art. V, § 3; MO. REV. STAT. § 477.050 (2000).

Statement of Facts

I. Procedural background

Ed Taylor, who lives in Ste. Genevieve County, brought this Hancock lawsuit in 2005, against the State, Ste. Genevieve County, and the Ste. Genevieve County Sheriff. Specifically, Mr. Taylor sought a declaration that the original version of the state's concealed carry funding mechanism, MO. REV. STAT. § 50.535(2) (Supp. 2004)(included in the Appendix), violated the Hancock Amendment, MO. CONST. art. X, §16-22, and that any certificates of qualification for concealed carry endorsements that the Ste. Genevieve County Sheriff issued under the repealed version were "null and void." LF 13 (Petition).

Mr. Taylor never sought a temporary restraining order or preliminary injunctive relief, or a trial setting. *See* LF 1-7 (docket sheet).

A few months after he filed the lawsuit, House Bill 365 was enacted – effective July 12, 2005 – repealing the original version of the funding mechanism and enacting the existing funding version. *See* MO. REV. STAT. § 50.535 (Supp. 2006) (included in Appendix).

The trial court issued an interlocutory order, dismissing any claims arising after the effective date of the new law. LF 4. Mr. Taylor never sought leave to amend his petition. *See* LF 1-7 (docket sheet).

The case was ultimately disposed of on cross-motions for summary judgment – the trial court granted the State's motion and denied Mr. Taylor's.

LF 5, 7. The court held that the case was altogether moot, but that Mr. Taylor was not entitled to the requested relief in any event. LF 245.

The separate defendants, the County and Sheriff, moved to "dismiss," or strike, Mr. Taylor's motion for summary judgment. The trial court denied that motion as moot. LF 5, 116, 245.

II. Factual background

A person who wishes to carry a concealed weapon on his person or in his vehicle applies to the sheriff of the county or city in which the person resides. MO. REV. STAT. § 571.101.1 (Supp. 2006). The sheriff processes the application and if the person qualifies, the sheriff issues a certificate of qualification for a concealed carry endorsement. *Id.* The person then applies to the director of the state department of revenue, who issues a driver's or non-driver's licenses bearing a concealed carry endorsement. *Id.* Only a person who has been issued a license bearing a concealed carry endorsement, and whose endorsement or license has not been suspended, revoked, cancelled, or denied, may carry concealed firearms on his person, or within a vehicle. *Id.*

At all times relevant here, a county sheriff processed permits to acquire concealable weapons, under MO. REV. STAT. § 571.090 (2000), in a manner

substantially similar to the processing of applications for a concealed carry endorsements under §571.101.1 (Supp. 2006).[1]

Relevant to Mr. Taylor's allegations, as of October 21, 2005[2]:

- no employee of the Ste. Genevieve County Sheriff's Department had claimed additional employee hours or overtime as a result of compliance with the concealed carry law, LF 143 ¶3, LF 153, 158, and 160[3];
- the Sheriff had not processed any renewal requests under the law, LF 143 ¶4, LF 161[4];
- the Sheriff had not notified the director of revenue of the expiration of any certificates under the law, LF 143, 162[5];

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1 Section 571.090 was repealed, effective August 28, 2007. L.2007, S.B. Nos. 62 & 41, § A.

2 October 21, 2005 was the date of the County and Sheriff's responses to written discovery.

3 Defendants County and Sheriff's Responses to Plaintiff's Requests for Admissions, Nos. 17 and 18, and Answers to Interrogatories Q and R.

4 Defendants County and Sheriff's Responses to Plaintiff's Requests for Admissions, No. 23, and Answer to Interrogatory W.

5 Defendants County and Sheriff's Responses to Plaintiff's Requests for Admissions, No. 24, and Answer to Interrogatory X.

- the Sheriff had not reissued any certificate on account of loss or destruction, LF 143, 162[6];
- the Sheriff had not reissued any certificate on account of name change, LF 143, 162[7]; and
- the Sheriff had not suspended or revoked any certificate, LF 144, 163[8].

The original version of the concealed carry funding mechanism permitted a sheriff to use money from the sheriff's revolving fund for the purchase of equipment and to provide training. MO. REV. STAT. § 50.535.(2)(Supp. 2004).

As noted in the preceding section, House Bill 365 was enacted effective July 12, 2005; the bill repealed the original version of the funding mechanism and enacted the existing version, MO. REV. STAT. § 50.535 (Supp. 2006). Both versions of the statute provided that the application fee collected by the sheriff

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[6] Defendants County and Sheriff's Responses to Plaintiff's Requests for Admissions, No. 25, and Answer to Interrogatory Y.

[7] Defendants County and Sheriff's Responses to Plaintiff's Requests for Admissions, No. 26, and Answer to Interrogatory Z.

[8] Defendants County and Sheriff's Responses to Plaintiff's Requests for Admissions, No. 27, and Answer to Interrogatory AA.

shall be deposited into the county sheriff's revolving fund, to be expended by the sheriff as provided by law.

As of October 21, 2005, the Ste. Genevieve County Sheriff had not spent any money from that fund, whether before or after July 12, 2005, the effective date of the new law. LF 144, 163[9]. But the fee money collected for costs incurred in complying with the concealed carry law "exceeded" any costs that they incurred. LF 144, 170[10].

[9] Defendants County and Sheriff's Answer to Interrogatory BB.

[10] Defendants County and Sheriff's Responses to Plaintiff's Requests for Admissions, No. 48, and Answer to Interrogatory VV.

Argument

Mr. Taylor's Hancock claim is utterly moot, in light of the repeal of the statute of which he complains, and enactment of a new one, of which he does not. In any event, his claim was also factually and legally deficient, particularly in light of *Brooks v. State,* 128 S.W.3d 844 (Mo. banc 2004) (included in Appendix). Mr. Taylor also asked for the wrong kind of relief. The trial court correctly granted summary judgment against Mr. Taylor.

Moreover, Mr. Taylor's claim was not "sustained"; therefore, he is not entitled to a "remand" for an award of fees and costs under MO. CONST. art. X, § 23.

I. Standard for summary judgment, and standard of review

Summary judgment is appropriate when the pleadings, discovery, and affidavits reveal no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Mo. S. Ct. Rule 74.04(c); *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 380 (Mo. banc 1993).

"A 'defending party' may establish a right to judgment by showing (1) facts that negate any one of the claimant's elements, (2) that the non-movant, after an adequate period of discovery, has not been able to produce, and will not be able to produce, evidence sufficient to allow the trier of fact to find the existence of any one of the claimant's elements, or (3) that there is no genuine dispute as to

the existence of each of the facts necessary to support the movant's properly-pleaded affirmative defense." *Id.* at 381.

Once the movant has demonstrated that no genuine issue of material fact exists, the burden shifts to the non-movant to show that there is a genuine dispute as to the material facts supporting the movant's right to summary judgment. *Id.* at 381-82. A genuine issue exists if there is a dispute that is real, not one consisting of merely conjecture, theory and possibilities. *Rice v. Hodapp*, 919 S.W.2d 240, 243 (Mo. 1996)(en banc).

This Court reviews a grant of summary judgment *de novo*. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993).

The standard of review for constitutional challenges to a statute is also *de novo. Hodges v. City of St. Louis,* 217 S.W.3d 278, 279 (Mo. banc 2007).

II. Mr. Taylor's unfunded mandate claim is moot. [Responds to Appellant's Point I.]

Courts do not render advisory opinions and routinely decline to opine if a controversy no longer exists. Whether Mr. Taylor's challenge might have been a live one at some point in the past, it is not now. The statute that he wanted enjoined has been repealed; the case that he wanted applied has been nullified; and the remedy that he sought under the old law is not viable, if it ever was at all.

A. Mr. Taylor challenges a statute that no longer exists.

When a court cannot grant effectual relief, a case "is moot and generally should be dismissed." *State ex rel. Reed v. Reardon,* 41 S.W.3d 470, 473 (Mo. banc 2001). Whether a claim is moot is not a purely intellectual exercise: "[M]ootness implicates the justiciability of a case[.]" *State ex rel. Acoff v. City of Univ. City,* 180 S.W.3d 83, 84 (Mo. App. E.D. 2005).

This Court will find a cause of action moot when

> the question presented for decision seeks a judgment upon some matter which, if the judgment was rendered, would not have any practical effect upon any then existing controversy. When an event occurs which renders a decision unnecessary, the appeal will be dismissed. And where an enactment supersedes the statute on which the litigants rely to define their rights, the appeal no longer represents an actual controversy, and the case will be dismissed as moot.

C.C. Dillon Co. v. City of Eureka, 12 S.W.3d 322, 325 (Mo. banc 2000)(internal citation omitted) (where SB 883 repealed former MO. REV. STAT. § 71.288, the Court's basis for declaring the constitutionality of that statute evaporated).

Or, as the Court stated even more succinctly last year, "No relief can be granted concerning the validity of [a] statute, now repealed." *In re BT*, 186 S.W.3d 276, 277 (Mo. 2006) (en banc) (whether MO. REV. STAT. § 210.117, Supp. 2004, was valid became a moot point where that statute was repealed and replaced by MO. REV. STAT. § 210.117 (Supp. 2005)).

Here, the passage of House Bill 365, effective July 12, 2005, repealed the original version of § 50.535 (Supp. 2004), which set forth the funding mechanism that Mr. Taylor challenged in this case, and replaced it with § 50.535 (Supp. 2006). The repealed statute provided, in relevant part:

> 2. No prior approval of the expenditures from this fund shall be required by the governing body of the county or city not within a county, nor shall any prior audit or encumbrance of the fund be required before any expenditure is made by the sheriff from this fund. <u>This fund shall only be used by law enforcement agencies for the purchase of equipment and to provide training</u>. If the moneys collected and deposited into this fund are not totally expended annually, then the unexpended balance shall remain in said fund and the balance shall be kept in said fund to accumulate from year to year.

This fund may be audited by the state auditor's office or the appropriate auditing agency.

A2, § 50.535.2 (Supp. 2004) (emphasis added).

The new law now provides, in relevant part:

> 2. No prior approval of the expenditures from this fund shall be required by the governing body of the county or city not within a county, nor shall any prior audit or encumbrance of the fund be required before any expenditure is made by the sheriff from the fund. This fund shall only be used by law enforcement agencies for the purchase of equipment, to provide training, and to make necessary expenditures to process applications for concealed carry endorsements or renewals, including but not limited to, the purchase of equipment, training, fingerprinting and background checks, employment of additional personnel, and any expenditure necessitated by an action under section 571.114 or 571.117, RSMo. If the moneys collected and deposited into this fund are not totally expended annually, then the unexpended balance shall remain in said fund and the balance shall be kept in said fund to

accumulate from year to year. This fund may be audited by the state auditor's office or the appropriate auditing agency.

3. Notwithstanding any provision of this section to the contrary, the sheriff of every county, regardless of classification, is authorized to pay, from the sheriff's revolving fund, all reasonable and necessary costs and expenses for activities or services occasioned by compliance with section 571.101 to 571.121, RSMo. Such was the intent of the general assembly in original enactment of this section and sections 571.101 to 571.121, RSMo, and it is made express by this section in light of the decision in Brooks v. State of Missouri, (Mo. Sup. Ct. February 26, 2004). The application and renewal fees to be charged pursuant to section 571.101 RSMo., shall be based on the sheriff's good faith estimate, made during regular budgeting cycles, of the actual costs and expenses to be incurred by reason of compliance with sections 571.101 to 571.121, RSMo. If the maximum fee permitted by sections 571.101, RSMo,

> is inadequate to cover the actual reasonable and necessary expenses in a given year, and there are not sufficient accumulated unexpended funds in the revolving fund, a sheriff may present specific and verified evidence of the unreimbursed expenses to the office of administration, which upon certification by the attorney general, shall reimburse such sheriff for those expenses from an appropriation made for that purpose.

A3, § 50.535.2 and .3 (Supp. 2006) (emphasis added).

Mr. Taylor did not seek a temporary restraining order or preliminary injunction before July 12, 2005, nor did he seek a trial setting before that date. Once the legislature repealed original § 50.535, then, any basis for a court to enjoin the original statute evaporated. *C.C. Dillon Co.,* 12 S.W.3d at 325; *In re BT*, 186 S.W.3d at 277.

To be sure, this Court did construe original § 50.535 as not permitting the application fees to cover costs, apart from training and equipment, in *Brooks,* 128 S.W.3d at 851. And in his Petition, Mr. Taylor attempted to mirror the deficiency that the Court perceived, by alleging that original § 50.535 only permitted the application fees to "be used for two purposes, neither of which is tied in any fashion to implementing or enforcing the [Act]." LF 12 (Petition, ¶14(f)).

But new § 50.535 explicitly provides a non-exclusive list of things on which law enforcement agencies may spend the fees that they collect in the course of processing concealed carry applications, and even includes a process for a county to obtain additional funds if the costs exceed the fees collected. Thus, the new legislation directly addressed the very concerns raised by this Court in *Brooks*.

Mr. Taylor's primary answer to the evisceration of his case wrought by House Bill 365's amendment of the § 50.535 funding mechanism during his lawsuit is to argue that the original law imposed an unfunded mandate nevertheless, and to point to the general savings statutes, MO. REV. STAT. §§ 1.170 and 1.180 (2000). As for the former argument, moot is moot; but the State addresses the lack of substantive merit to his claim in Section III, below. As for the latter argument, his reliance on the savings statutes is misplaced for three independent, if intertwined, reasons.

First, no savings statute, not even §§ 1.170 or 1.180, "saves" a "right" to bring a new declaratory judgment suit against the State regarding a statutory provision that was already declared unconstitutional. In other words, there is no "right" to a *second*, identical declaration that a statute is unconstitutional. Indeed, if there were such a "right," the courts would be forever clogged by different parties pursuing virtually the same suit, presumably to the same conclusion.

But more to the point, neither the original nor new version of § 50.535 gives any vested right to Mr. Taylor, whether explicitly or implicitly. By its plain language, the statute simply provides a funding mechanism for the benefit of a sheriff in processing concealed carry applications and renewals. And in funding law enforcement, the statute is remedial in nature, conducive to the public good and effecting a beneficial purpose. No vested cause of action exists in a remedial statute. *See Vaughn v. Taft Broadcasting Co.,* 708 S.W.2d 656, 660 (Mo. banc 1986)(statutory amendment that took away punitive damages for a cause of action could be applied retroactively; punitive damages are remedial and no plaintiff has a vested right to them); *State ex rel. LeFevre v. Stubbs*, 642 S.W.2d 103, 106 (Mo. banc 1982)(redemption statute remedial in nature; party could not avoid statutory provision that assisted mortgagors and their grantees); and *State ex rel. Ford v. Wenskay,* 824 S.W.2d 99, 100 (Mo. App. E.D. 1992)(Uniform Parentage Act is remedial, based on need to protect minors; defendant had no right to avoid Act and to proceed under common law).

Second, the savings statutes do not operate in the fashion that Mr. Taylor suggests anyway, *i.e.*, to presume what they perceive to be a flaw in a statute and render the concept of mootness meaningless when the legislature repeals it. In other words, according to Mr. Taylor, the legislature could never, as a practical matter, "fix" a flawed statute. Statutory repeals certainly can and do affect on-going litigation, and that is what happened here. Generally, §§ 1.170

and 1.180 establish that if the legislature does not indicate what effect a repeal shall have on rights and remedies, then courts assume that the legislature acted with reference to the general savings statutes, and the repeal will be of limited effect on rights and remedies. *Arie v. Intertherm, Inc.*, 648 S.W.2d 142, 159 (Mo. App. E.D. 1983), *overruled on other grounds, as recognized by Enyeart v. Shelter Mut. Ins. Co.,* 784 S.W.2d 205, 207-208 (Mo. App. W.D. 1989); *Protection Mut. Ins. Co. v. Kansas City*, 551 S.W.2d 909, 912 (Mo. App. W.D. 1977). Therefore, when the legislature does indicate what effect a repeal is to have, that legislative direction controls.

Here, of course, the legislature did indicate what effect its repeal should have – the new law was retroactive. The funding mechanism was to cover all reasonable and necessary costs and expenses for activities or services occasioned by compliance with §§ 571.101 to 571.121, and made plain that that had always been the legislature's intent. § 50.535.3 (Supp. 2006)("Such was the intent of the general assembly in original enactment of this section and sections 571.101 to 571.121, RSMo, and it is made express by this section in light of the decision in Brooks[.]").[11] In other words, because of new § 50.535.3, local governments

[11] The new statute should not be read in a narrow way. Remedial statutes are construed liberally to "meet cases within the spirit or reason of the

Footnote continued on next page

were and are free to use any monies collected prior to the amendment for the processing of concealed carry applications, on all reasonable and necessary costs and expenses for activities or services occasioned by compliance with the concealed carry law.

We know from the written discovery Mr. Taylor performed that the Sheriff never spent any money out of his revolving fund – at least not as of October 2005, three months *after* the new funding mechanism was put in place. LF 163. The record is silent as to why not. A logical inference is that the expense of processing the applications was *de minimus* and simply business as usual. Regardless, whether the Sheriff took advantage of the revolving fund at any time – to pay for training and equipment under the original section, or to pay any expenses under the new section – does not make the new statute any less retroactive and applicable to prior expenses, and, logically, cannot establish any Hancock violation.

And finally, third, declining to read the savings statutes in such a broad fashion is abundantly logical here, inasmuch as Mr. Taylor's vehicle – a Hancock claim – is a vehicle that affords such limited relief. Hancock establishes a limited waiver of sovereign immunity, and waivers of sovereign immunity are

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law" and resolving all reasonable doubts in favor of applicability. *LeFevre,* 642 S.W.2d at 106. *See also Ford,* 824 S.W.2d at 100 (same).

strictly and narrowly construed in the State's favor. *E.g., Ring v. Metropolitan St. Louis Sewer Dist.,* 969 S.W.2d 716, 718 (Mo. banc 1998); *Lucent Technologies, Inc. v. Director of Revenue,* 123 S.W.3d 290, 295 (Mo. App. W.D. 2003). In *Ring*, for example, the Court reaffirmed its holding in *Fort Zumwalt Sch. Dist. v. State,* 896 S.W.2d 918 (Mo. banc 1995), that no explicit consent by the State to be sued for general money damages appears in Article X, §23, and that the Court will not infer or imply waivers of sovereign immunity to extend to remedies that are not essential to enforce the right in question. 969 S.W.2d at 718.

This Court in *Brooks* likewise applied a narrow reading to Hancock's sovereign immunity waiver. There, the only thing that the Court declared ran afoul of the constitution was the limited aspect of the concealed carry funding mechanism that functioned as an unfunded mandate. 128 S.W.3d 844, 850. As such, the Court held, the State could not require local governments to process concealed carry applications under the old funding mechanism, *i.d.*, that is, the only thing enjoined was the mandate. The Court did not declare that the four counties could not process concealed carry applications at all; they were free to voluntarily process applications. Indeed, in the very next paragraph of the opinion, the Court explicitly held that increased costs attributable to training and equipment could still be recouped by imposition of a sheriff's fee. *Id.*

And to be crystal clear, this Court in *Brooks* did not declare any aspect of the concealed carry law "void *ab initio*," as Mr. Taylor argues. Appellant's Brief, p. 21. The Court did not hold that permitting Missourians to carry concealed weapons violated *any* provision of the State or federal constitutions.

In short, *Ring, Fort Zumwalt,* and *Brooks* teach that the only remedy for an unfunded mandate is suspension of the mandate, not invalidation of any actions taken under the mandate, including actions voluntarily taken, and not state reimbursement of any monies already spent by a local entity.

For support, Mr. Taylor seizes on a footnote in *Carmack v. Mo. Dep't of Agriculture*, 31 S.W.3d 40, 48 n.4 (Mo. App. W.D. 2000). *See* Appellant's Brief, pp. 19-20. According to Mr. Taylor, *Carmack* was a case in which a "new statute repealing and replacing [an] unconstitutional statute did not apply because it was enacted after the actions complained of took place," and supporting his overarching argument that subsequent statutory amendments just don't affect litigation over repealed statutes. *Id.* Not quite.

The statute at issue in *Carmack* explicitly waived the State's sovereign immunity and established Mr. Carmack's right to payment for his slaughtered livestock, under a specific formula. 31 S.W.3d at 48. Not surprisingly, the statute's subsequent repeal and the enactment of a new statutory formula – which did not speak to retroactivity at all – were irrelevant to that plaintiff's right to reimbursement. *Id.* at n.4.

B. House Bill 365 nullifies *Brooks v. State*, 128 S.W.3d 844 (Mo. banc. 2004).

Another reason why Mr. Taylor's unfunded mandate claim is not justiciable is that the new law nullifies this Court's decision in *Brooks*. There the Court held that original §50.535 permitted fees to be used only for costs "that may be incurred for training and equipment," but that "substantial costs may be incurred [by local governments] for other purposes, as well." 128 S.W.3d at 850. "If so, there is an unfunded mandate." *Id.*

In the new version, the General Assembly specifically addressed the Court's construction of original § 50.535, essentially saying that the Court had got it wrong in *Brooks*. § 50.535 (Supp. 2006) ("Such was the intent of the general assembly [to enact a comprehensive funding mechanism] *in its original enactment of* this section[.]")(emphasis added).

The enactment of new § 50.535 and its effect on the *Brooks* decision is analogous to the course that Missouri's sovereign immunity doctrine took in the 1970's. This Court abolished the common law doctrine of sovereign immunity in *Jones v. State Highway Comm'n*, 557 S.W.2d 225 (Mo. banc 1977). In response to *Jones*, the General Assembly codified the doctrine at MO. REV. STAT. §537.600 (1978), and explicitly stated therein that sovereign immunity existed as it had "prior to September 12, 1977," the date of the *Jones* decision. *State ex rel. Mo.*

Div. of Family Services v. Moore, 657 S.W.2d 32, 34 (Mo. App. W.D. 1983). No court ever disturbed that legislative directive.

So too does House Bill 365 nullify the Court's holding in *Brooks* regarding an unfunded mandate. House Bill 365 nullifies it even more clearly than the enactment of § 537.600 nullified *Jones*, inasmuch as House Bill 365 explicitly states that the General Assembly's intent had always been to enact a comprehensive funding mechanism. So too does House Bill 365 nullify, or moot, Mr. Taylor's claim.

C. In view of the repeal of the challenged funding mechanism, this Court can grant no effective relief.

A third reason that Mr. Taylor's unfunded mandate claim no longer presents an actual controversy is, as touched on above, that the only available remedy for such a claim is a suspension of the mandate, *Fort Zumwalt*, 896 S.W.2d at 923, and the mootness of his claim forecloses such an order.[12] Thus,

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[12] To be sure, Mr. Taylor prayed for more relief than suspension of any unfunded mandate. He also sought a declaration that endorsements already issued were "null and void." LF 13 (Petition). No such relief can be afforded for a Hancock violation – whether the case is moot or not – as discussed in Section III.C., below.

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even if Mr. Taylor could have established an unfunded mandate under the original law, before it was repealed, a judgment suspending that mandate would be of no practical effect *now* – House Bill 365 has already suspended it. And again, "the question presented for decision" is moot when a judgment "would not have any practical effect upon any then existing controversy." *C.C. Dillon,* 12 S.W.3d at 325.

The plaintiff's claims are moot for the three separate reasons discussed above, and the trial court properly granted summary judgment against Mr. Taylor.

III. Mr. Taylor's unfunded mandate claim also fails on the merits. [Further responds to Appellant's Point I.]

Mr. Taylor also requested, in his motion for summary judgment below, a money judgment against the State, requiring the State to make reimbursement for any costs the County incurred under the old funding mechanism or in complying with any judgment in this case. LF 89. But he did not raise that argument in his opening brief and it is now abandoned. *Page v. Metropolitan St. Louis Sewer Dist.,* 377 S.W.2d 348, 354 (Mo. 1964) (issue not raised in appellant's first brief cannot be raised in reply brief); *Muegler v. Berndsen,* 964 S.W.2d 459, 462 n. 3 (Mo. App. E.D. 1998) (same).

If the Court proceeds to review Mr. Taylor's claim substantively, it fails as a matter of fact and law.

A. Mr. Taylor did not provide sufficient, specific evidence of increased costs.

Even if the Court were to find that Mr. Taylor's Hancock claim is not moot, which it is, he did not prove unfunded, state-mandated new or increased costs with specific evidence, which was his burden as the plaintiff. His failure of proof is fatal as a matter of fact and law.

To establish an unfunded mandate claim under Hancock, a party must plead and prove that: "(1) a new or increased activity or service is required of a political subdivision by the State and (2) the political subdivision experiences increased costs in performing that activity or service." *City of Jefferson v. Missouri Dept. of Natural Resources*, 916 S.W.2d 794, 795 (Mo. banc 1996) (*City of Jefferson II*) (internal citation omitted).

These elements must be supported by specific facts. *Brooks*, 128 S.W.3d at 849 ("these elements cannot be established by mere 'common sense,' or 'speculation and conjecture'"); *Div. of Employment Security v. Taney County District R-III*, 922 S.W.2d 391, 395 (Mo. banc 1996)(plaintiffs must establish these elements through "a specific factual showing"); and *Miller v. Director of Revenue*, 719 S.W.2d 787, 788-89 (Mo. banc 1986)(plaintiffs must provide "a

specific factual showing" of increased costs associated with the new or increased activity).

In *Brooks*, for example, the Court held that challengers satisfied the specific-facts requirement by showing that one county would incur increased costs in the amount of $150,000 for personnel to process concealed carry applications, and $38 per fingerprint analysis performed by the highway patrol for background checks. 128 S.W.3d at 849. And while the evidence "was sparse," the challengers satisfied their specific-facts requirement with respect to three other counties by showing that those counties would incur a cost of $38 per fingerprint analysis performed by the highway patrol for background checks. *Id.*

In the instant case, Mr. Taylor did not even make the "sparse" showing. He put on no evidence of the amount of costs attributable to administration of the concealed carry law in Ste. Genevieve County.[13] That evidentiary failure is fatal to his Hancock claim. In any event, the evidence before the trial court demonstrated that any costs the County experienced were *de minimus*, or covered by the application fee, or that the County voluntarily absorbed costs.

Under the original funding mechanism, for example, the Sheriff could have at least used the revolving fund for training or equipment, but never did

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[13] The County and Sheriff's responses to Mr. Taylor's written discovery contained no such figures. *See* LF 154-170 (discovery responses).

spend any of it. LF 144, 163[14]. Mr. Taylor, as the non-movant, is entitled only to reasonable inferences from the summary judgment record. *ITT Commercial,* 854 S.W.2d at 376; *Client Services, Inc. v. City of St. Charles,* 182 S.W.2d 718, 721 (Mo. App. E.D. 2006) (same). And the reasonable inference from these facts is that any training and equipment costs that the Sheriff incurred were *de minimus,* or otherwise voluntarily covered by the Sheriff or County.

The reasonableness of that inference is further supported by the Sheriff's description of what costs were incurred for. The Sheriff admitted that the department "incurred additional expenses for equipment, supplies and other materials." LF 160 (Request No. 19). The funding mechanism has always permitted the application fee to be used for "equipment." § 50.535.2 (Supp. 2004). And "equipment" is synonymous with "apparatus, machinery, paraphernalia, outfit, tackle, gear, [and] material." WEBSTER'S THIRD NEW INTERNAT'L DICTIONARY, UNABRIDGED, 768 (1993). The word "equipment [usually] covers everything, except personnel, needed for efficient operation of a service[.]" *Id.* Missouri courts look to the plain meaning of words used in statutes, *State ex rel. Broadway-Washington Associates, Ltd. v. Manners,* 186 S.W.3d 272, 275 (Mo. 2006) (en banc), and here, the plain meaning of "equipment" embraces "supplies" and "other materials." Thus, if the Sheriff

[14] Defendants County and Sheriff's Answer to Interrogatory BB.

incurred any expenses – *de minimus* or otherwise – for equipment, including supplies and other materials, the original funding mechanism could have covered them.

The inference of *de minimus,* or adequately covered, or voluntarily absorbed, costs is also supported by the County's and Sheriff's admission that the fee collected in fact exceeded costs incurred. LF 170.

The inference is supported by the fact that processing concealed carry applications under MO. REV. STAT. §571.101, *et seq.* (Supp. 2006), is redundant of duties that a sheriff is already charged with performing, such as processing and issuing permits to acquire concealable firearms under MO. REV. STAT. §571.090 (2000).[15] And the inference is supported by the facts that while the original funding mechanism was in place, the sheriff here never had to pay for additional employee hours or overtime; process any renewal requests; notify the department of revenue of the expiration of any certificates; reissue lost or

[15] To be clear, a sheriff administers some, but not all, aspects of the concealed carry law. The state director of revenue issues licenses bearing concealed carry endorsements. §571.101.1 and .7 (Supp. 2006).

destroyed certificates; reissue certificates due to name change; or suspend or revoke any certificates.[16]

Mr. Taylor argues that the foregoing does not matter, because he was not required to put on such evidence, in light of the County and Sheriff's statement in their discovery responses that they did experience new or increased activities or services and that the County paid for them out if its funds. Appellant's Brief, p. 14. That argument is wrong for two reasons. One, it ignores the Court's holding in *Brooks*. And in any event, it supposes that the question of whether an activity or service is new or increased for purposes of establishing a Hancock violation is a pure question of fact. It is not; this Court treats it as a question of law, or a mixed question of law and fact. *See County of Jefferson v. Quiktrip Corp.,* 912 S.W.2d 487, 491 (Mo. banc 1995)(concluding that distribution of tax revenue "is part of normal operations of any county" and that Article X, § 21 was not violated by imposition of "de minimus administrative activity of calculating amounts due and writing checks); *Employees' Retirement System v. Jackson County,* 738 S.W.2d 118, 121-122 (Mo. 1987)(concluding that "net effect" of new requirement favored county and that Article X, § 21 was not violated). A party's opinion regarding a legal question is not evidence of an unfunded mandate.

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[16] *See* Statement of Facts, pp. 12-13.

Because Mr. Taylor did not make the required, specific factual showing of state mandated, increased but unfunded costs, his Hancock claim also fails as a matter of law.

B. A political subdivision's voluntary expenditure of funds does not equal the State's violation of Hancock.

Aside from Mr. Taylor's inability to meet the specific facts requirement, his Hancock claim fails for another reason – he did not show that a new or increased activity was mandated *by the State*, as Article X, sections 16-21 require. *City of Jefferson II,* 916 S.W.2d at 75. This element of a Hancock claim simply is not present where, as here, an entity voluntarily elects to fund a statutory program.

In *City of Jefferson v. Mo. Dep't of Natural Resources,* 863 S.W.2d 844, 847 (Mo. banc 1993), the Court considered the constitutionality of a statute creating solid waste management districts within solid waste management regions. The Court held that Hancock was not implicated by a statutory provision allowing cities to join solid waste management districts "if they choose to do so." *Id.* at 848. In other words, when an entity chooses to participate in a statutory program, the "mandate" element of a Hancock claim does not exist.

The Court of Appeals held much the same in an unfunded mandate case years earlier, *Citizens for Rural Preservation, Inc. v. Robinett,* 648 S.W.2d 117 (Mo. App. W.D. 1982). There, a state commission determined that public roads

within a county had to be resurfaced before they could be put to particular use. *Id.* at 123. The commission issued a construction permit to Six Flags, that was contingent on the county's approval of the road surfacing and had a mechanism for the county's costs to be covered. *Id.* The court rejected the county's unfunded mandate claim:

> On these facts, the county remains free to choose whether or not to permit the surfacing of the roads. If it chooses to deny permission, no maintenance of the roads will be required If it grants permission, it may do so on the condition that Six Flags maintain the roads. If it does not so require, the county will be consciously choosing to maintain the roads itself. Having so chosen, the county cannot be said to have been required to undertake "new or expanded activities."

Id.

Here, Mr. Taylor's claim is that Ste. Genevieve County and the Sheriff complied with the concealed carry law after the Supreme Court decision in *Brooks*, processing concealed carry applications in the absence of an appropriation. Operation of the law was enjoined statewide from its effective date (October 11, 2003) until this Court dissolved the injunction for all counties in the 2004 *Brooks* decision – not on any Hancock grounds, but on the trial

court's decision, ultimately overturned by this Court, that the law violated MO. CONST. art. I, § 23. This Court in *Brooks,* though, amply and plainly demonstrated how a county could "belt and suspender" its choice not to process concealed carry applications thereafter if the county believed it would experience unfunded costs.

But here, the undisputed facts demonstrate that concealed carry applications were nevertheless processed in Ste. Genevieve County after the *Brooks* decision. The reasonable inference from the record is that the County and Sheriff voluntarily did so – an inference made all the more reasonable by the undisputed fact that the $100 application fee the Sheriff collected was, by his admission, sufficient to cover his costs.

As a matter of law, the County and Sheriff's choice to proceed with processing concealed carry applications under the law cannot support a claim of an unfunded mandate.

C. Mr. Taylor asks for relief for which Missouri law does not provide.

As already discussed, relief under Hancock is limited to suspension of the mandate. As discussed below, that rule also disposes of his demand that all permits issued while the original funding mechanism was in place be declared "null and void." In addition, Mr. Taylor cannot avoid the exclusive statutory

mechanism for challenging an issued certificate of qualification, nor overcome his failure to join necessary parties.

1. Again, the Hancock remedy is simply about avoiding an unfunded mandate.

A finding of a Hancock violation does not mean that a law is void – simply that a local entity may avoid an unfunded mandate. *E.g. Fort Zumwalt,* 896 S.W.2d at 923 (remedy for a Hancock violation is "declaratory judgment relieving a local government of the duty to perform an inadequately funded required service or activity"). In other words, Hancock does not speak to the substantive validity of any law.

Accordingly, even if Mr. Taylor could succeed on the merits of his Hancock claim, which he cannot, he points to no authority under Hancock, and there is none, that allows for invalidating endorsements issued while the original funding provision was in effect.

2. Any deficiency in the issue of endorsements under the original law was remedied by the new law.

Another reason that the invalidation of concealed carry endorsements issued under the original law is not available in this case is that if they were invalid, which they were not, then new §50.535 effectively validated or ratified

them. As discussed in Section II.B., the legislature established in House Bill 365 that there was no funding infirmity in the original statute to begin with.[17]

While this Court has had not had occasion to address subsequent legislative ratification, the U.S. Supreme Court and other federal courts have, for almost 150 years, recognized Congress' authority to do so. *See, e.g., Swayne v. Hoyt, Ltd.,* 300 U.S. 297, 301-302 (1937); *Mattingly v. District of Columbia,* 97 U.S. 687, 690 (1878); *EEOC v. Dayton Power & Light Co.*, 605 F. Supp.13, 18-19 (S.D. Ohio 1984).

And by its plain language, new §50.535 operates retroactively. The section "ma[kes] express" the General Assembly's intent to enact a comprehensive funding mechanism "in its original enactment of this section." §50.535(2)(Supp. 2006).

Because the legislature effectively validated or ratified any endorsements issued prior to July 12, 2005 (to the extent that they needed to be at all), and the new law operates retroactively, Mr. Taylor cannot claim that the permits issued while the original funding mechanism was in place are invalid.

3. Section 571.117 provides the exclusive remedy for invalidating an endorsement.

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[17] And Mr. Taylor does not challenge the validity of the new law.

The circuit court also lacked subject matter jurisdiction to declare invalid any holder's endorsement under Hancock because there is an exclusive statutory remedy for doing so, §571.117 (Supp. 2006), which Mr. Taylor did not invoke. Specifically, the statute provides:

> Any person who has knowledge that another person, who was issued a certificate of qualification for a concealed carry endorsement …, *never was* or no longer is eligible for such endorsement under the criteria established in sections 571.101 to 571.121 may file a petition with the clerk of the small claims court to revoke that person's certificate of qualification for a concealed carry endorsement …

Id. (emphasis added).

Under Mr. Taylor's theory that concealed carry endorsements issued under the original law must be held null and void, any endorsement holder in Ste. Genevieve County who obtained an endorsement under the old law "never was" eligible for it. Following the thread of his argument, that means he must pursue the exclusive remedy of §571.117(1) to secure the invalidation of any such endorsements. He has not and that is fatal.

Declaratory judgment does not lie where there is a specific, adequate, statutory procedure for challenging an administrative decision. *State ex rel.*

Director v. Pennoyer, 872 S.W.2d 516, 518-519 (Mo. App. E.D. 1994), *citing State ex rel. Director of Revenue v. Kinder,* 861 S.W.2d 161, 163 (Mo. App. W.D. 1993).

And like mootness, exclusivity of remedy goes to a court's jurisdiction: "Where the legislature provides a method for review, that procedure is exclusive and must be used, or the court acts without jurisdiction." *Nash v. Director of Revenue*, 856 S.W.2d 112, 113 (Mo. App. E.D. 1993), *citing Cullen v. Director of Revenue*, 804 S.W.2d 749, 750 (Mo. banc 1991).

Moreover, statutory procedures for challenging administrative rulings are "adequate" for the purposes of challenging the validity of the underlying statute. In *Pennoyer*, for example, the Eastern District held that the trial court lacked jurisdiction to entertain a challenge to the constitutionality of a law that authorized the suspension or revocation of driving privileges, pending a trial de novo, for drivers arrested for driving under the influence. 872 S.W.2d at 518-519. A specific statutory procedure existed for challenging administrative rulings, in which the constitutional challenge could be raised. *Id.*

As in *Pennoyer,* the statute here provides a specific procedure – available to "any person" – to seek to revoke a concealed carry endorsement. As such, it is a specific and adequate statutory procedure, and the exclusive remedy, that Mr. Taylor must employ to seek revocation of endorsements. He cannot bootstrap his request for revocation to any claim in this case.

4. Mr. Taylor failed to join necessary parties.

Even if invalidation is a viable remedy, it is not available in this case for yet another reason. Mr. Taylor failed to join the endorsement holders whose rights would be affected by such a judgment. Rule 87.04 of the Court's Rules of Civil Procedure requires that "[w]hen declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to such proceedings."

Accordingly, the absence of the individual endorsement holders prevents this Court, and prevented the lower court, from invalidating their concealed carry endorsements in any event.

IV. The trial court properly denied Mr. Taylor's request for attorney fees under Mo. Const. art. X, §23, inasmuch as his claim was not sustained. [Responds to Appellant's Point II.]

Article X, §23 of the Missouri Constitution is a limited waiver of the state's sovereign immunity and does not authorize fees here.

Waivers of the State's sovereign immunity are strictly and narrowly construed. *Richardson v. State Highway & Transp. Comm'n*, 863 S.W.2d 876, 882 (Mo. banc 1993); *Casey v. Chung,* 989 S.W.2d 592, 594 (Mo. App. E.D. 1998), *quoting Brennan v. Curators of the Univ. of Mo.*, 942 S.W.2d 432, 434 (Mo. App. W.D.1997).

Under Article X, §23, if a taxpayer's suit to enforce Article X, §§16-22 "is sustained, [the taxpayer] shall receive from the applicable unit of government his costs, including reasonable attorney's fees incurred in maintaining such suit." Whether a challenger's Hancock claim has been "sustained" depends on whether the challenger obtained the relief "initially sought." *Gilroy-Sims and Associates v. Downtown St. Louis Business District*, 729 S.W.2d 504, 507 (Mo. App. E.D. 1987).

In *Gilroy-Sims*, the plaintiff was entitled to attorney fees because his Hancock challenge achieved the results that he initially sought. 729 S.W.2d at 507. He asserted a Hancock claim following the enactment of a St. Louis City ordinance that created a new tax, which had not been voted on. *Id.* After the plaintiff filed suit, the City enacted another ordinance, placing an identical tax measure for a vote in the next election. *Id.* The circuit court subsequently dismissed the Hancock challenge as moot, and the plaintiff sought attorney fees under Article X, Section 23. *Id.* At the hearing on attorney fees, the City stipulated that "the filing of the Gilroy-Sims petition was the motivating factor in the Board of Aldermen adopting the ordinance calling the Hancock election." *Id.* The Eastern District upheld the circuit court's determination that the plaintiff was the prevailing party, even though he did not receive a judgment in his favor, because his Hancock challenge indeed achieved the results he initially sought – that the new tax be placed before the voters. *Id.*

Here, of course, Mr. Taylor did not achieve the result that he initially sought – a declaration that the original funding mechanism violated Hancock and that "any certificate of qualification for a concealed carry endorsement issued on or before the date of the [requested] Declaratory Judgment be null and void." LF 13 (Petition). And the change to the funding mechanism was triggered by the *Brooks* decision – new § 50.535 says so – not Mr. Taylor's lawsuit.

Mr. Taylor is not entitled to fees and costs under Article X, §23.

Conclusion

The trial court's judgment should be affirmed.

Respectfully submitted,

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Certification of Service and of Compliance with Rule 84.06(b) and (c)

The undersigned hereby certifies that on this 7th day of September, 2007, one true and correct copy of the foregoing brief and appendix, and one disk containing the foregoing brief, were sent by U.S. mail, first class and postage paid, to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule 84.06(b), and that the brief contains 8,563 words.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

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Assistant Attorney General

Appendix