IN THE MISSOURI SUPREME COURT

No. SC 88559

ED TAYLOR,

Plaintiff – Appellant

v.

STATE OF MISSOURI et al,

Defendants – Respondents.

On Appeal from the Circuit Court of Ste. Genevieve County

Case No. 05SG-CC00049, Hon. Kenneth W. Pratte

BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT

This appeal falls within the Supreme Court's appellate jurisdiction under Art. V, § 3 of the Missouri Constitution because it involves "the validity of a statute or provision of the Constitution of Missouri."

On March 17, 2005, Plaintiff brought this challenge pursuant to Article X, Section 23 of the Missouri Constitution to enforce Sections 16 through 22 of Article X of the Missouri Constitution (commonly referred to as the "Hancock Amendment"), as applied to MO Rev. Stat. §§ 571.101 through 571.121 (the "Concealed Carry Act").

On December 4, 2006, the Circuit Court of Ste. Genevieve County entered Summary Judgment for Defendants. The court found that the controversy was moot following the passage of subsequent legislation, which repealed and replaced the Concealed Carry Act and purported to fix the Hancock Amendment violations that formed the basis of Plaintiff's Petition.

The court denied plaintiff's requested remedies seeking declaratory judgment that any permits issued in Ste. Genevieve County under the Concealed Carry Act as originally enacted were unconstitutional and invalid pursuant to the Hancock Amendment of Missouri Constitution, and for fees and costs in accordance with Art. X, Sec. 23 of the Missouri Constitution. This appeal followed.

Accordingly, this appeal falls within the Supreme Court's appellate jurisdiction under Art. V, §3 of the Missouri Constitution because it involves "the validity of a statute or provision of the Constitution of Missouri."

STATEMENT OF FACTS

This case raises a constitutional challenge under Missouri's Hancock Amendment to the application of the state's Concealed Carry Act in Ste. Genevieve County prior to the time the law was amended, following this Court's ruling invalidating the law, to address the Hancock Amendment violations. Specifically, Plaintiff brought this challenge in the Circuit Court of Ste. Genevieve County pursuant to Article X, Section 23 of the Missouri Constitution (A14) to enforce Sections 16 through 22 of Article X of the Missouri Constitution (commonly referred to as the "Hancock Amendment") (A3), as applied to Mo. Rev. Stat. §§ 571.101 through 571.121 (the "Concealed Carry Act"), as then enacted (A15). The Circuit Court entered Summary Judgment, finding the controversy moot following passage of subsequent legislation that repealed and replaced the Concealed Carry Act and purported to cure the Hancock violations that the Missouri Supreme Court found in the law. The Circuit Court denied Plaintiff's prayer for declaratory judgment that any permits issued under the original Concealed Carry Act are unconstitutional and that such permits should be invalidated, and for fees and costs as provided by the Missouri Constitution. This appeal followed.

The Concealed Carry Act governed, *inter alia*, the application for and issuance of certificates of qualifications for concealed carry endorsements, i.e., permits to carry concealed weapons. Under Mo. Rev. Stat. § 571.101(10) (Supp. 2004), "[f]or processing an application for a certificate of qualification for a concealed carry endorsement[.] . . . the sheriff in each county shall charge a

nonrefundable fee not to exceed one hundred dollars which shall be paid to the treasury of the county to the credit of the sheriff's revolving fund." The nonrefundable fee for processing a renewal was not to exceed fifty dollars. Mo. Rev. Stat. § 571.101(11) (Supp. 2004). Further, Mo. Rev. Stat. § 50.535(2) (Supp. 2004) (A33) provided that "the fee collected pursuant to subsections 10 and 11 of [S]ection 571.101, RSMo., shall . . . only be used by law enforcement agencies for the purchase of equipment and to provide training."

Plaintiff Ed Taylor is a resident and taxpayer of Ste. Genevieve County, Missouri. On March 17, 2005, he filed suit against the State of Missouri, Ste. Genevieve County, and Ste. Genevieve County Sheriff Gary J. Stolzer alleging that the Concealed Carry Act as then in place violated the Hancock Amendment provision of Missouri's Constitution on grounds that it required the County to engage in new and expanded activities and services and to incur additional and increased costs not appropriated under the Act. (LF 8-14)

Pursuant to the Concealed Carry Act as then enacted, Ste. Genevieve County Sheriff Gary Stolzer issued concealed carry permits to residents of Ste. Genevieve County. Defendants' Responses to Admissions (LF 93-109; 154-170) at ¶ 12. Sheriff Stolzer received monetary application fees from residents of Ste. Genevieve County for the issuance of their concealed carry permits. Defendants' Responses to Admissions at ¶ 4. All of the fees paid by residents of Ste. Genevieve County for the issuance of their concealed carry permits were deposited into the Ste. Genevieve County Sheriff Department's Revolving Fund pursuant to Mo. Rev.

Stat. § 50.535.1. Defendants' Responses to Admissions at ¶¶ 6, 8.

The Ste. Genevieve County Sheriff's Department increased the activities and/or services it previously provided and provided new activities and/or services in order to issue permits under the Concealed Carry Act. Defendants' Responses to Admissions at ¶¶ 13, 14. In order to comply with the Concealed Carry Act, the Sheriff and the County, among other new or increased activities and services:

- requested and conducted criminal background checks through appropriate law enforcement agencies;
- evaluated applicants' attestations as to age, citizenship, residency, felony status, misdemeanor status, military discharge status, and mental competence;
- determined whether an applicant behaved in a pattern, documented in public records, that caused the Sheriff to have a reasonable belief that the applicant presented a danger to himself or others;
- fingerprinted applicants;
- communicated with applicants about the status of their applications; and
- notified applicants of denials and any appeal rights.

Defendants' Responses to Admissions at ¶¶ 20, 36-45.

The Sheriff's Department incurred additional costs by increasing activities and/or services and by providing new activities and services in order to issue permits under the Concealed Carry Act. Defendants' Responses to Admissions at ¶¶ 15, 16. The Sheriff's Department incurred additional expenses for equipment,

supplies and other materials as a result of complying with the Concealed Carry Act. Defendants' Responses to Admissions at ¶ 19. The new and expanded activities and services imposed by the Concealed Carry Act have directly caused Ste. Genevieve County and the Sheriff to incur increased costs. Defendants' Responses to Admissions at ¶¶ 46, 47.

As of November 4, 2005, no monies had been used from the Ste. Genevieve County Sheriff Department's Revolving Fund, into which concealed carry permit application fees were deposited, for any purposes. Defendants' Responses to Admissions at ¶¶ BB, EE. Rather, the County expended its own funds to pay for activities or services it or the Sheriff's Department performed in the issuance of concealed carry permits. Defendants' Responses to Admissions at ¶ 34. Portions of taxpayer dollars, including general revenue funds, have been expended by Ste. Genvieve County and the Sheriff in carrying out the provisions of the Concealed Carry Act. Defendants' Responses to Admissions at ¶¶ 33, 35.

On Feb. 26, 2004, the Missouri Supreme Court ruled that the Concealed Carry Act was an unconstitutional unfunded mandate under the Missouri Constitution's Hancock Amendment. *Brooks v. State*, 128 SW3d 844, 850 (Mo. banc 2004) (A41).

Subsequently, on July 12, 2005, HB 365 (A34) was signed into law by Governor Matt Blunt. HB 365 repealed and replaced the Concealed Carry Act and purported to fix the Hancock Amendment violations that form the basis of Plaintiff's Petition. Plaintiff's claim thus concerns permits issued under the

unconstitutional regime prior to the law's amendment.

On October 4, 2005, the Circuit Court of Ste. Genevieve County denied Defendants' motions to dismiss Plaintiff's claims under the Concealed Carry Act as originally enacted. On December 4, 2006, the Circuit Court entered Summary Judgment for Defendants (A1). The Court's judgment found that the controversy was moot following the passage of House Bill 365, which repealed and replaced the Concealed Carry Act and purported to fix the Hancock Amendment violations that formed the basis of Plaintiff's Petition.

The Circuit Court denied plaintiff's prayer for declaratory judgment that any permits issued in Ste. Genevieve County under the Concealed Carry Act as originally enacted were unconstitutional and that any such permits be rendered invalid pursuant to the Missouri Constitution, and further denied plaintiff's request for fees and costs in accordance with Art. X, Sec. 23 of the Missouri Constitution. On January 3, 2007, Plaintiff filed his Motion to Reconsider, Vacate, Reopen, Correct, Amend or Modify Judgment (LR 247), and on April 12, 2007, this Appeal was filed. (LR 250).

POINTS RELIED ON

I. The Circuit Court erred by not declaring the Concealed Carry Act unconstitutional as applied to permits issued in Ste. Genevieve County under the law as originally enacted and by not invalidating those permits because the County incurred new and increased costs and activities in their compliance with this unfunded mandate, because the amendment to the law did not nullify this claim, and because declaratory judgment is a valid remedy for this constitutional injury.

- Mo. Const. Art. X, § 16-22
- *Brooks v. State*, 128 S.W. 3d 844 (Mo. banc 2004)
- *City of Jefferson v. Mo. Dept. of Natural Resources*, 863 S.W.2d 844 (Mo. banc 1993)
- *City of Jefferson v. Mo Dept. of Natural Resources*, 916 S.W.2d 794 (Mo. banc 1996)
- *Carmack v. Missouri Department of Agriculture*, 31 S.W.3d 40 (Mo. Ct. App. 2000)

II. Plaintiff is entitled to fees and costs pursuant to the Missouri Constitution, and even if Plaintiff's claims for declaratory relief were subsequently made moot due to the amendment of the Concealed Carry Act, the Circuit Court erred in not allowing Plaintiff's claims for costs and reasonable attorneys fees to proceed because the repeal of the Concealed Carry Act did not render this remedy moot.

- Mo. Const. Art. X, § 23
- *R.E.J., Inc., v. The City of Sikeston*, 142 S.W.3d 744 (Mo. App. 2004)
- *Gilroy-Sims & Associates v. Downtown St. Louis Business District*, 729 S.W.2d 504 (Mo. App. 1987)

ARGUMENT

Standard of Review

Appeals from a grant of summary judgment are essentially reviewed *de novo*. *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp*., 854 S.W.2d 371, 376 (Mo. banc 1993). Summary judgment is proper when the moving party has demonstrated that "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Id*. at 381; Mo. R. Civ. P § 74.04(c)(3). Because the propriety of summary judgment is primarily an issue of law, this Court has concluded that its review of such judgments is essentially *de novo*. *See Premium Standard Farms, Inc., v. Lincoln Township of Putnam County et al.,* 946 S.W.2d 234, 237. (Mo. banc 1997). The record on appeal from summary judgment is to be reviewed by this Court in the light most favorable to the party against whom judgment was entered, in this case, the appellant Ed Taylor. *Id*.

I. THE CIRCUIT COURT ERRED BY NOT DECLARING THE CONCEALED CARRY ACT UNCONSTITUTIONAL AND INVALID AS TO PERMITS ISSUED IN THE COUNTY UNDER THE LAW AS ORIGINALLY ENACTED.

A. The Concealed Carry Act As Applied in Ste. Genevieve County Constitutes an Unfunded Mandate, Which Is Constitutionally Prohibited.

The citizens of Missouri ratified Art. I, Sections 16 *et seq*., commonly known as the Hancock Amendment, to the state constitution in 1980 to "rein in increases in governmental revenue and expenditures." *Thompson v. Hunter*, 119 S.W.3d 95, 98 (Mo. 2003); *Roberts v. McNary*, 636 S.W.2d 332, 336 (Mo. banc 1982). The

intent of the Hancock amendment was to "protect taxpayers from government's ability to increase the tax burden above that borne by the taxpayers" on the date it was approved. *Fort Zumwalt Sch. Dist. v. State*, 896 S.W.2d 918, 921 (Mo. banc 1995).

Section 16 prohibits the state from "requiring any new or expanded activities by counties and other political subdivisions without full state financing." Mo. Const. Art. X, § 16. Section 21 prohibits the General Assembly or any state agency from requiring counties or other political subdivisions to perform "a new activity or service . . . unless a state appropriation is made and disbursed to pay the county or other political subdivision for any increased cost." Mo. Const. Art. X, § 21. These sections together prohibit the legislative practice known as an "unfunded mandate." Thus, while the legislature may require political subdivisions to perform new or expanded activities, it must make an appropriation to cover the costs of those activities. The legislature must provide a means for funding the increased costs caused by *each* mandated service or activity. *Boone County Court v. State*, 631 S.W.2d 321, 326 (Mo. banc 1982).

Numerous provisions of the Concealed Carry Act as originally enacted set forth a myriad of new or increased activities and services that county sheriffs and their designees "shall" perform in order to comply with the Act, among other things, determining the applicant's suitability, fingerprinting, conducting a criminal background check through various law enforcement agencies, notifying applicants of the status of their applications, and providing notice and carrying out applicants

rights to appeal. *See* Mo. Rev. Stat. § 571.094.5 (Supp. 2004). It is undisputed that Ste. Genevieve County carried out these mandates in processing applications.

Moreover, when the legislature originally created an application fee in the Concealed Carry Act, it prohibited counties and other political subdivisions from using that fee to pay for most of the new or increased activities and services the law mandated. Section 50.535.2 of the Act provided, "This fund shall only be used by law enforcement agencies for the purchase of equipment and to provide training." The use of the word "shall" in Section 50.535.2 was just as mandatory upon counties as the same language found in Section 571.094.1, which requires that the "sheriff shall issue a certificate of qualification for a concealed carry endorsement." Thus, on its face, the law as originally enacted specifically prohibited use of the sheriff's revolving fund established by Section 50.535.1 to pay for its implementation, beyond training and equipping personnel. Indeed, as set forth below, this Court so concluded in *Brooks v. State* and thus found the law unconstitutional.

As described further herein, it is undisputed that Ste. Genevieve County engaged in new and expanded activities and services in order to comply with the mandates of the Concealed Carry Act. Moreover, it is undisputed, that, prior to the law's amendment, any permits issued under the law were done under the regime that expressly barred the County from using application fees or monies in the sheriff's revolving fund to pay for most of its mandated activities under the law – a regime this Court concluded was unconstitutional in *Brooks.* Accordingly, Ste.

Genevieve County's actions in carrying out the mandates of the Concealed Carry Act as originally enacted violate Sections 16 through 22 of Article X of the Missouri Constitution, any such permits should be deemed unconstitutional and invalid, and declaratory judgment to this effect should be entered.

B. Plaintiff Is Entitled To Relief Under *Brooks v. State*, in Which the Very Provisions At Issue Have Been Deemed Unconstitutional By This Court.

The Missouri Supreme Court has already held that the provisions at issue in this case – Mo. Rev. Stat. §§571.101 through 571.121 as originally enacted – violate the Hancock Amendment of the Missouri Constitution as an unfunded mandate. *Brooks v. State*, 128 S.W. 3d 844, 850 (Mo. banc 2004). This Court concluded that compliance with the Concealed Carry Act forced local authorities to incur increased costs and expenses not reimbursed under the law's legislative scheme. *Id*. This Court's conclusion as to the Concealed Carry Act's unconstitutionality governed the law's application in every county across Missouri, *Id*. at 850, though the Court held that enforceability as to specific counties would be premature until a claim was brought with evidence of increased costs. *Id*. at 849-50. Thus, to prevail, the plaintiff here need only establish that the issue was ripe by showing that Ste. Genevieve County incurred more than *de minimus* costs for new or increased services or activities in complying with the unconstitutional provision. *See id*. at 849. Because, based on undisputed facts, the County has incurred such costs, plaintiff should prevail. The Circuit Court's ruling should thus be reversed.

1. Ste. Genevieve County Incurred Costs for New or Increased Services or Activities in Complying With the Concealed Carry Act as Originally Enacted, Rendering Plaintiff's Claims Ripe Under *Brooks*.

It is undisputed that Ste. Genevieve County incurred costs for new or increased services or activities in complying with the Concealed Carry Act as originally enacted. The parties agree that all fees paid by permit applicants in Ste. Genevieve County were deposited into the Sheriff's revolving fund and that under the Concealed Carry Act as originally enacted, that fund could only be used to purchase equipment for training. *See* Mo. Rev. Stat. § 50.535.(2) (Supp. 2004). There is also no dispute that in order to comply with the Concealed Carry Act, the Sheriff and Ste. Genevieve County engaged in certain new and increased activities and services; in particular, the County and Sheriff:

- requested and conducted criminal background checks through appropriate law enforcement agencies;
- evaluated applicants' attestations as to age, citizenship, residency, felony status, misdemeanor status, military discharge status, and mental competence;
- determined whether an applicant behaved in a pattern, documented in public records, that caused the Sheriff to have a reasonable belief that the applicant presented a danger to himself or others;
- fingerprinted applicants;
- communicated with applicants about the status of their applications; and

- notified applicants of denials and any appeal rights.

Defendants' Responses to Admissions at ¶¶ 20, 36-45. It is further not disputed that as of November 4, 2005, no money had been spent from the Sheriff's revolving fund. Rather, respondents admit that the County expended its own funds to pay for activities or services it or the Sheriff's Department was required to perform in issuing concealed carry permits. Defendants' Responses to Admissions at ¶ 34. The parties agree that taxpayer dollars, including general revenue funds, were expended by Ste. Genvieve County and the Sheriff in carrying out the mandates of the Concealed Carry Act prior to the time of its amendment. Defendants' Responses to Admissions at ¶¶ 33, 35.

Plaintiff need not have proffered exact dollar figures concerning the County's increased costs in order to prevail. This Court has made clear that while it "will not presume increased costs resulting from increased mandated activity[.] . . . plaintiffs need *only* show that the increased costs will be more than *de minimus*."[1] *Brooks*, 128 S.W.3d at 849 (emphasis added) (quoting *City of Jefferson v. Mo. Dept. of Natural Resources*, 863 S.W.2d 844, 848 (Mo. banc 1993) and *City of Jefferson v. Mo Dept. of Natural Resources*, 916 S.W.2d 794, 795 (Mo. banc 1996)). This is not a case in which increased costs are speculative, *see Miller v. Director of Revenue*, 719 S.W.2d 787, 789 (Mo. banc 1986) (no Hancock violation where appellant failed to produce any evidence and rested argument on speculation and conjecture), but rather, as listed above, the defendants admit that the County undertook

1 This is not an arduous standard. In *Brooks,* this Court found that burden had been met by three counties by the $38 for fingerprint analysis they would have to conduct under the law. *Brooks,* 128 S.W.3d at 849.

articulable and specific increased and new activities and services in order to carry out duties under the law as previously enacted, and that the County paid for these activities from its own funds.

Accordingly, it is clear that the Sheriff's Department increased the activities and/or services it previously provided or provided new activities and services in order to comply with the Concealed Carry Act. It is further clear that the County incurred additional costs for providing these activities and services in order to comply with the Concealed Carry Act. Moreover, the County incurred additional expenses for equipment, supplies and other materials as a result of it carrying out its obligations under the Concealed Carry Act. The law made clear that the revolving fund could not be used to cover these costs, and it is undisputed that taxpayer dollars thus funded the costs incurred by the County in carrying out its obligations under the Concealed Carry Act.

It is immaterial to the assessment of the Hancock violation whether the application fees collected exceeded the costs incurred,[2] and it is immaterial whether the County had to pay additional employee hours or overtime, as the State claimed in its Motion for Summary Judgment. It is immaterial whether the Sheriff had occasion to process renewal requests, notify the state of the expiration of any

2 Indeed, under the law as originally enacted, even if the application fees exceeded the costs incurred, those fees could not have been used to cover the Sheriff's and County's costs incurred in complying with the Concealed Carry Act. The law expressly limited the Sheriff's revolving fund, which is where application fee money was deposited, to covering costs for training or purchasing new equipment only, and therefore neither the Sheriff nor the County could have used any alleged excess application fee to pay for their costs in complying with the law. *See* Mo. Rev. Stat. §50.535(2) (Supp. 2004). This is precisely the reason this Court found the provisions unconstitutional in *Brooks*, 128 S.W.3d at 850.

certificates, to reissue certificates or to suspend or revoke a certificate under the regime. All that is relevant is whether the Concealed Carry Act mandated new or increased services or activities that resulted in increased costs to the County. *See Brooks*, 128 S.W.2d at 848-50. Here, there is no dispute that the law as originally enacted mandated new or increased services or activities that resulted in increased costs to the County in carrying out the provisions of the law prior to its amendment, and that the County carried out new and increased services or activities. Accordingly, such actions violated the Missouri Constitution's Hancock Amendment, any permits issued under the law as originally enacted are unconstitutional and should be rendered invalid, and thus declaratory judgment to that effect should be granted.

At the least, there is a genuine dispute of fact that should have precluded the issuance of summary judgment. Under the standard of review, it is the Plaintiff/Appellant in this case who is to be given the benefit of all reasonable inferences, and where the evidence reasonably supports any inference other than the State's, there is a genuine dispute that renders the Circuit Court's grant of Summary Judgment in error. *See ITT Commercial Finance Corp. v. Mid-American Marine Supply Corp.,* 854 S.W.2d 371, 381-82 (Mo. 1983). Viewing the record in the light most favorable to the Plaintiff, any evidence that presents a genuine dispute as to material fact renders Summary Judgment in error. *Id.* Here it is undisputed that the county incurred increased costs; the question is whether such costs were more than *di minimus*. Even if respondent's assertions are true, simply

because the Sheriff and the County did not undertake certain activities (e.g., process renewal requests, notify the state of the expiration of any certificates, reissue, revoke or suspend certificates) does not mean that other new and increased services or activities were not undertaken; indeed, as laid out above, it is undisputed they were. Thus, the court below had before it sufficient evidence from which to conclude that the costs incurred by the Sheriff and County in complying with the Concealed Carry Act were more than *de minimus*.

Accordingly, the plaintiff has met the burden imposed by *Brooks v. State* by showing that the issue was ripe in Ste. Genevieve County because it incurred more than *de minimus* costs for new or increased services or activities in complying with the unconstitutional provision. *See* 128 S.W. 3d at 849. *Brooks* rendered the Concealed Carry Act unconstitutional as to its application in every county. *Id.* at 850. On that there is no dispute. To prevail in this particular county, plaintiff need only establish that the issue was ripe by showing that the county incurred more than *de minimus* costs for new or increased services or activities in complying with the provision. Because the the county has borne such costs, or at the least because there is a genuine dispute as to whether such costs were more than *di minimus*, the Circuit Court erred in granting summary judgment to defendants. Accordingly, this Court should reverse and enter judgment for the Plaintiff.

C. The July 2005 Amendment to the Concealed Carry Act Does Not Render Plaintiff's Claims Moot or Nullify this Court's Ruling in *Brooks v. State*.

The subsequent amendment of the Concealed Carry Act does not render

Plaintiff's claims moot or nullify the Missouri Supreme Court's decision in *Brooks*. On July 12, 2005, Governor Blunt signed into law HB 365 (hereinafter "Concealed Carry Act 2"), which repealed and replaced the Concealed Carry Act as originally enacted and purported to fix the Hancock Amendment violations found by this Court in *Brooks* by allowing permit application fees deposited in the Sheriff's revolving fund to be used by local governments in carrying out their duties under the law. *See* Mo. Rev. Stat. § 50.535 (Supp. 2005). The Circuit Court erred in concluding that "plaintiff's action . . . has been rendered moot by the passage of HB 365 . . ." because such a conclusion prevents the law from acknowledging the constitutional injury brought by permits issued under the unconstitutional scheme. In its decision, the Circuit Court found that the Concealed Carry Act 2 "makes manifest the legislature's original intent that fees collected for processing concealed carry applications cover 'all reasonable and necessary costs and expenses for activities or services occasioned by compliance with section 571.101 to 571.121 RSMo.'"

Despite the language in HB 365 concerning the legislature's intent, the application of Concealed Carry Act 2 to Plaintiff's claims not only flies in the face of the clear language of the law as originally enacted, on which the Sheriff and County had to rely in carrying out their duties under the Act before it was amended, but it also defies well-established legal principles.

1. The Sheriff and County Had to Rely On Law's Explicit Prohibition on Using the Sheriff's Revolving Fund to Cover Its Obligations Under

the Law.

First, despite the actual language in HB 365 indicating that allowing the Sheriff's revolving fund to cover costs occasioned by the law "was the intent of the general assembly in the 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 language of the law as originally enacted was clear on its face that "[t]his fund *shall only* be used by law enforcement agencies for the purchase of equipment and training." Mo. Rev. Stat. § 50.535 (Supp. 2004) (emphasis added). Indeed, this Court also construed the language of the original statute to expressly bar application fees from covering counties' costs, apart from training and equipment. *Brooks*, 128 S.W.3d at 851. That is precisely the reason this Court found the law as originally enacted to violate the Hancock Amendment. However, the Court in *Brooks* made clear that despite the law's unconstitutionality, it would enjoin the mandate only in the four counties in which specific evidence of increased costs was presented, until ripeness in other counties was shown through subsequent claims. *Id*. at 849. Thus, from the time that the Act was originally enacted until the legislature amended the law through HB 365, Ste. Genevieve County was subject to its mandates. In carrying out its obligations under the Concealed Carry Act as originally enacted, the Sheriff and Ste. Genevieve County had to rely on the clear meaning of that language, and indeed, it did not use any of the monies in the Sheriff's revolving fund to cover the costs of its new and increased activities and services occasioned by their

compliance with the Concealed Carry Act. That the new law later purported to cure the Hancock deficiencies does not change the manner in which permits issued under the original version of the law were carried out. It is undisputed that permits issued prior to the law's amendment were issued pursuant to an unconstitutional regime, and accordingly, those permits should be deemed unconstitutional and rendered invalid and declaratory judgment to that effect should issue.

2. Missouri Law is Clear that Plaintiff's Claim is Not Rendered Moot by Subsequent Legislation.

Moreover, it is well-established in Missouri law that plaintiff's claim is not rendered moot by the passage of the subsequent legislation. Specifically, "[n]o action or plea pending at the time any statutory provisions are repealed shall be affected by the repeal; but the same shall proceed, in all respects, as if the statutory provisions had not been repealed . . ." Mo. Rev. Stat. § 1.180. Similarly:

> "The repeal of any statutory provision does not affect any act done or right or accrued or established in any proceeding, suit or prosecution had or commenced in any civil case previous to the time the repeal takes effect; but every such act, right and proceeding remains as valid and effectual as if the provisions so repealed had remained in force."

Mo. Rev. Stat. §1.170. Missouri law thus expressly prohibits the conclusion reached by the Circuit Court and sought by the State – that somehow the provisions of the Concealed Carry Act 2 should be applied to Plaintiff's claims as if the Concealed Carry Act as originally enacted never existed. *See e.g., Carmack v. Missouri Department of Agriculture*, 31 S.W.3d 40, 48 n.4 (Mo. Ct. App. 2000) (new statute repealing and replacing

unconstitutional statute did not apply because it was enacted after the actions complained of took place.) Here, it is undisputed that the County carried out duties under the specific regime mandated by the original law, while that law was in full effect -- a regime later found to be unconstitutional. Thus *Carmack* applies and the provisions of the Concealed Carry Act 2 cannot be applied to Plaintiff's claims. An interpretation to the contrary leaves the status of any permits issued under the old regime in a type of legal purgatory because it nullifies the ability of the law to acknowledge the constitutional injury borne by the actual application of the unconstitutional law. Accordingly, Plaintiff's claim is ripe with respect to permits issued under the Concealed Carry Act as originally enacted, and the Circuit Court's judgment is therefore in error.

3. Plaintiff's Claim Seeks Relief for Injury Incurred Prior to the Time the Law Was Amended.

To be clear, Plaintiff is not seeking to have the Court declare the constitutionality of a law that had already been repealed, as the State has characterized, but rather seeks relief for the constitutional injury resulting from the application of the unconstitutional statute prior to the time it was amended to cure the constitutional deficiencies. c.f. *C.C. Dillon Co. v. City of Eureka*, 12 S.W.3d 322 (Mo. banc 2000) (where plaintiff challenged the constitutionality of a statute that had already been repealed when plaintiff's claims were brought.) Such is not the case here; the Concealed Carry Act had not been repealed when plaintiff's

claims were brought, and permits were being issued under that law, resulting in a real and specific constitutional injury. It did not get repealed until July 2005, well after the court's ruling in *Brooks*, which, despite ruling the law unconstitutional, left the law's mandates unenjoined in all but four counties. Moreover, unlike *In Re BT*, 186 S.W.3d 276 (Mo. banc 2006), on which the State relies, in which a statute was repealed while an appeal of the statute's validity was pending, here the statute at issue was declared unconstitutional before it was amended, and Plaintiff seeks remedy from the injury caused by the application of the unconstitutional statute prior to its amendment. Accordingly, Plaintiff's claims are not moot and the Circuit Court's ruling is therefore in error.

4. *Brooks* Rendered the Concealed Carry Act Void From its Enactment.

This Court's ruling in *Brooks* rendered the Concealed Carry Act void from its enactment. *See Carmack*, 31 S.W.3d at 48 (unconstitutional statute is void *ab initio*). Thus, between the time the Concealed Carry Act was enacted and the time the Concealed Carry Act 2 became effective, permits were applied for, processed, and issued in Ste. Genevieve County pursuant to an unconstitutional statute. On this there is no disagreement. The subsequent enactment of the Concealed Carry Act 2 does not magically cure the constitutional deficiencies of permits issued under the prior unconstitutional statute -- the constitutional injury remains and will remain until the point it is declared invalid by the court. This Court ensured that result in *Brooks* when it rendered the law unenforceable only in the four counties in which evidence of costs had been presented. *Brooks*, 128 S.W.3d at 849.

Accordingly, plaintiff still has a claim for the constitutional injury brought by application of the original unconstitutional statute and the Circuit Court's judgment should be reversed.

5. The Subsequent Legislation Did Not Nullify *Brooks.*

The enactment of the Concealed Carry Act 2 did not nullify this Court's ruling in *Brooks,* which deemed the Concealed Carry Act as originally enacted unconstitutional. Rather the new law acknowledges that "the intent of the . . . original enactment . . . is made express in this section in light of the Court's decision in Brooks . . . ." Mo. Rev. Stat. § 50.535 (Supp. 2005). Indeed, the law was amended to be made consistent with this Court's decision in *Brooks.* This is therefore unlike the situation in *Jones v. State Highway Comm'n*, 557 S.W.2d 225 (Mo. banc 1977), relied upon by the State, in which this Court abrogated the general doctrine of sovereign immunity, only to have the legislature later restore sovereign immunity to the status it held prior to the *Jones* decision. *See State v. Moore*, 657 S.W.2d 32 (Mo. Ct. App. 1983). Here, the statute was amended after this Court's decision in *Brooks* to be made consistent with the decision, not to nullify the *Brooks* decision or restore the law to its previous status. Thus, Plaintiff has a valid remedy under *Brooks* for the constitutional injury caused by issuance of permits under the Concealed Carry Act as originally enacted and therefore the Circuit Court's ruling is in error and Plaintiff should prevail under *Brooks.*

D. Plaintiff Has a Valid Remedy at Law

The Circuit Court erred in concluding that Plaintiff lacked an adequate

remedy at law in his request for declaratory judgment. The court held that one of Plaintiff's requested remedies, the invalidation of concealed-carry permits issued under the law as originally enacted, "is not a proper remedy for a Hancock violation . . . ." The court found that "Hancock does not preclude a local government from choosing to comply with an unfunded mandate, and therefore provides no sword to third parties wishing to undo the historical effect of a local government's choice to comply with an unfunded mandate." To the contrary, declaratory relief both as to the unconstitutionality of the law as applied in Ste. Genevieve County, and the invalidation of any permits issued subject to that law, are appropriate remedies.

1. Compliance with the Unfunded Mandate Was Not Voluntary.

Nothing in the law or the record supports the conclusion that the Sheriff and County voluntarily chose to issue permits under the original Concealed Carry Act. The law did not leave compliance optional, nor did it give the Sheriff or the County the option of not issuing concealed weapons permits under the unfunded mandate scheme. Rather, it creates a right of Missouri citizens to apply for a permit and be issued one if they were so eligible. The law makes compliance mandatory, providing: "If the said applicant can show qualification as provided by sections 571.101 to 571.121, the county or city sheriff *shall* issue a certificate of qualification for a concealed carry endorsement." Mo. Rev. Stat. 571.101(1) (emphasis added). The Concealed Carry Act as originally enacted further did not allow the County or Sheriff to voluntarily comply with an unfunded mandate, but

rather made the County and Sheriff's participation in the unconstitutional scheme mandatory, providing "the fee collected pursuant to subsections 10 and 11 of [S]ection 571.101, RSMo., *shall* . . . only be used by law enforcement agencies for the purchase of equipment and to provide training." Mo. Rev. Stat. § 50.535(2) (emphasis added). The use of the word "shall" in Section 50.535.2 was just as mandatory upon counties as the same language found in Section 571.094.1, which requires that the "sheriff *shall* issue a certificate of qualification for a concealed carry endorsement." Accordingly, the Circuit Court's conclusion that Plaintiff lacked a remedy under Hancock because Hancock did not preclude the County and Sheriff's voluntary participation in an unfunded mandate is in error, and judgment for the Plaintiff should enter.

Moreover, this Court's ruling in *Brooks* expressly made clear that the unfunded mandate could not be enjoined here until there was proof that the issue was ripe in this specific county. *Brooks*, 128 S.W.3d at 849-50, (holding that disposition in counties other than the four ruled upon by the case was "premature" and that "ripeness must be determined county by county"). Thus, even though the Act was found to violate the Hancock Amendment, the County and Sheriff had no choice but to issue permits under the unfunded mandate until such time as a challenge was waged by a taxpayer after permits had been issued. The *Brooks* decision anticipates this result.[3] Ste. Genevieve County itself could not have

3 This result of the *Brooks* decision is expressly acknowledged by the dissent, saying "The principal opinion's delay in requiring compliance with Hancock for the remainder of Missouri's counties will merely result in unnecessary adjudications in the remaining Missouri counties not enjoined by today's holding." *Brooks*, 128 S.W.3d at 854, White, J., dissenting.

challenged the mandate as it does not have standing under the Missouri Constitution to do so – only a taxpayer does. *See* Mo. Const. Art. X, Sec. 23.

2. Declaratory Judgment That Permits Were Issued Unconstitutionally and Invalidation of Permits Issued Under the Unfunded Mandate Are Both Appropriate Remedies.

Plaintiff's sought remedies of declaratory judgment that permits issued under the original law are unconstitutional and that any such permits should be invalidated are valid remedies at law, and the Circuit Court erred in concluding otherwise. The State argued below that the only relief available to Plaintiff under Hancock is suspension of the unfunded mandate, a remedy that was rendered moot by the enactment of the Concealed Carry Act 2. However, this conclusion ignores the law and would result in providing no avenue for the law to recognize the injury borne and that still exists from permits that were issued unconstitutionally under the prior scheme – a result that clearly defies public policy.

The law does not provide any bar to the declaratory relief Plaintiff seeks. This Court has found that the Missouri Constitution "authorizes taxpayer suits to enforce the provisions of Section 21 without saying what remedies are available other than attorneys fees and costs." *Fort Zumwalt School Dist. v. State*, 896 S.W.2d 918, 923 (Mo. banc 1995). This Court went on to hold that while the Missouri Constitution does not allow a suit for money damages to enforce the Hancock Amendment, it said that there are certainly other "equally effective but less onerous remed*ies*" available thereunder. *Id.* (emphasis added), clearly

suggesting multiple possible remedies. The Court did not detail or restrict the nature of those remedies, but rather simply held that a "declaratory judgment relieving a local government of the duty to perform an inadequately funded required service or activity" is *one* of the remedies available. *Id.*[4]

Obviously, the enactment of Concealed Carry Act 2 does the job of relieving the County and Sheriff from the obligation of performing the unfunded mandate since the time of its enactment. However, it does nothing to cure the constitutional injury brought by the issuance of permits under the unconstitutional scheme prior to the time the Concealed Carry Act was amended. That injury exists and will continue to exist unless and until a court declares unconstitutional and invalidates permits issued under the unconstitutional scheme. Each and every permit issued under the Concealed Carry Act as originally enacted visited constitutional injury upon Ste. Genevieve County and its taxpayers. This is a real and continuing constitutional injury. Nothing in Missouri law prevents the court from recalling those permits and/or declaring them invalid under Hancock. Even if the Court rejects Plaintiff's plea to invalidate the permits issued under the law as originally enacted, it can still issue declaratory judgment that the law is unconstitutional under Hancock as it was applied in Ste. Genevieve County prior to the law's

4 Indeed, members of this court have acknowledged that a declaratory judgment ruling that application of the Act violates Hancock in a particular county is an appropriate remedy in the wake of *Brooks.* As the dissent notes, "Following today's ruling, once an application for a concealed firearms license is filed by a single individual, in each of the remaining 'unenjoined' counties, a single taxpayer in that same county need only seek a declaratory judgment that the Conceal and Carry Act violates the Hancock Amendment and demonstrate *any* additional cost to the county resulting from the Act to succeed in enjoining its enforcement." *Brooks,* 128 S.W.3d at 854, n.7 (White, J., dissenting), suggesting that declaratory judgment as to the law's constitutionality under Hancock is available.

amendment. Indeed, the appropriate remedy for this real constitutional injury is the declaratory relief Plaintiff seeks. Any conclusion to the contrary would render the law impotent to recognize the constitutional injury borne by the permits issued under the unconstitutional scheme, or provide remedy for that constitutional injury – a result that defies public policy. In his Petition, Plaintiff specifically requests that the court "issue a Declaratory Judgment finding the Concealed Carry Act and the application of the Concealed Carry Act in this case violates Art. X, Secs. 16 through 22 of the Missouri Constitution[.]" Plaintiff's Petition at p.6. Plaintiff asked the court to construe the constitutionality of the Concealed Carry Act under *Brooks* as applied in Ste. Genevieve County in the form of Declaratory Judgment. This is a real remedy, one that the law does not preclude, and one that is available in this case. The Circuit Court therefore erred in finding otherwise, and therefore declaratory relief is warranted.

II. PLAINTIFF IS ENTITLED TO FEES AND COSTS PURSUANT TO THE MISSOURI CONSTITUTION.

Even if plaintiff's claims as to the application of the Concealed Carry Act are deemed to have been made moot by HB 365, the Circuit Court erred in failing to allow Plaintiff's claims for costs and reasonable attorneys fees to proceed because the repeal of the Concealed Carry Act did not render this remedy moot. This lawsuit involved a Hancock Amendment challenge under Art. X §§ 16-22 of the Missouri Constitution to Mo. Rev. Stat. §§ 571.101-571.121, the Concealed Carry Act. Among the remedies sought by plaintiff was the award of costs and

reasonable attorney fees, a remedy specifically provided for in Art. X, Section 23 of the Missouri Constitution.

As stated above, appellant asserts that the Circuit Court erred in concluding that his claim for declaratory relief was moot following the enactment of the Concealed Carry Act 2. However, even if Plaintiff's claim for declaratory relief under the the Concealed Carry Act as originally enacted was mooted by the subsequent legislation, the repeal of the Conceal Carry Act did not render moot Plaintiff's remedy of costs and attorneys fees that are specifically provided for under Art. X, Section 23 of the Missouri Constitution. Where the repeal of a law being challenged does not bestow "the relief sought and authorized pursuant to statute," then the issue of that remedy is not moot. *R.E.J., Inc., v. The City of Sikeston*, 142 S.W.3d 744, 746 (Mo. App. 2004).

In *Gilroy-Sims & Associates v. Downtown St. Louis Business District*, 729 S.W.2d 504 (Mo. App. 1987), the Missouri Court of Appeals upheld the awarding of attorney fees under Art. X, Section 23 where, as here, the underlying controversy (in that case, a Hancock challenge to a city ordinance) was rendered moot by the challenged ordinance being superseded by subsequent passage of another ordinance. After the trial court held that the Hancock Amendment challenge was moot, it retained jurisdiction to resolve the remaining issue of costs and attorneys fees and entered judgment granting such a remedy. *Id.* *Gilroy-Sims* should control here as well. The repeal of the Concealed Carry Act did not render moot plaintiff's prayer for costs and reasonable attorney fees that are expressly

authorized by Art. X, Section 23 of the Missouri Constitution. Accordingly, even if the this Court concludes that the court below did not err in its ruling as to the mootness of Plaintiff's claim for declaratory judgment, it should still hold that the lower court erred in failing to allow Plaintiff's claims as to costs and reasonable attorney fees to proceed pursuant to Art. X, Section 23. Accordingly, this Court should remand the matter to the Circuit Court for the determination of fees and costs.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Circuit Court of Ste. Genevieve County, grant declaratory relief to Plaintiff, and remand the matter to the Circuit Court on the issue of reasonable attorneys fees and costs, or in the alternative, remand the case to the Circuit Court to allow plaintiff's claims for declaratory relief and for costs and reasonable attorneys fees to proceed, and for such further relief as this Court deems just and proper.

Respectfully Submitted,

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CERTIFICATE OF SERVICE AND

CERTIFICATE OF COMPLIANCE WITH RULE 84.06(b) and (c)

The undersigned hereby certifies that on the 4th day of August, 2007, one true and correct copy of the foregoing brief, one disk containing the foregoing brief, one true and correct copy of Appendix to Appellant's brief were mailed, postage pre-paid, to counsel for respondents:

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The undersigned further hereby certifies that the foregoing brief complies with the limitations contained in Rule 84.06(b), and that the brief contains 8,219 words.

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

_____
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