**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

# REPLY BRIEF OF APPELLANT

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## ARGUMENT

### I. This Claim is Real and Substantial and Therefore the Missouri Supreme Court has Jurisdiction in this Case

Respondents argue that Plaintiff's constitutional challenge is not real and substantial, and accordingly, that this Court lacks jurisdiction to hear this appeal. This Court's jurisdiction of constitutional questions is controlled by Art. V., Sec. 3 of the Missouri Constitution, which provides that, "'The supreme court shall have exclusive appellate jurisdiction in all cases involving the validity of . . . a statute or provision of the constitution of this state . . . ." *See Rodriguez v. Suzuki Motor Corp*, 996 S.W.2d 47, 51 (Mo. banc 1999), a case cited by Respondents. Here, as in *Rodriguez*, the appellant "challenges the constitutional validity" of a Missouri statute and thus jurisdiction should lie. *See Id.* at 51.

In *Rodriguez*, this Court found that a claim was "real and substantial" and thus the Supreme Court had jurisdiction, where the claim "was brought in good faith," and where "[t]his Court has never passed on the *exact* issue regarding" the statute in question (in that case whether the payment of one-half of punitive damage awards into the state fund for tort victims' compensation violated the Excessive Fines Clause, or the Takings Clause). *Id.* at 52 (emphasis added). This Court rejected the plaintiff's argument that the matter had been settled by an earlier

case, noting that the prior case had addressed the takings issue only as it applied between the state and the plaintiff who won the punitive damage award, without addressing the defendant's perspective. *Id.* at 53. Here, Respondents similarly argue that this court lacks jurisdiction to hear appellant's claim on grounds that this Court has already addressed the constitutionality of the Concealed Carry law in *Brooks v. State*, 128 S.W.3d 844 (Mo. banc 2004). But here, as in *Rodriguez*, this Court, has not addressed the *specific* matter raised in Appellant's claim – the constitutional infirmity of the law's funding mechanism in Ste. Genevieve County.

Respondents point to *State v. Newlon*, 216 S.W.2d 180 (Mo.App. E.D. 2007), in which the Court of Appeals assumed jurisdiction of a case in which the state Supreme Court had already ruled on the constitutionality of the jury instruction under attack in that case. *Newlon* is not analogous. Unlike *Newlon,* in which the Missouri Supreme Court had already opined as to the constitutionality of the jury instruction, here, this Court has not opined on the particular issue in this case – the Hancock violation in Ste. Genevieve County. Indeed, this Court expressly *refused* to opine as to the constitutional violation in any but the four counties in which it found those claims ripe in *Brooks*, 128 S.W.3d at 849. Ste. Genevieve County was not among those.

*Brooks* explicitly held that "in the absence of specific proof of increased

costs in the remaining Missouri counties, *disposition of the case as to those counties is premature*." 128 S.W.3d at 849 (emphasis added). The effect of this ruling is that for each additional county, a taxpayer must "seek a declaratory judgment that the Conceal and Carry Act violates the Hancock Amendment" in that county by demonstrating any additional cost to the county. *Id.* at 854 fn 7 (White., J., dissenting). Thus, *Brooks* never addressed – and expressly refused to address – the constitutionality under the Hancock Amendment of the Concealed Carry Law in Ste. Genevieve County. *Id.* at 849. In *Rodriguez,* Justice Limbaugh wrote that this Court "entertains plausible claims, which necessarily are made in good faith, but not feigned, fictitious or counterfeit claims, which necessarily are not." 996 S.W.2d at 52. Following the Court's holding in *Brooks* that disposition in other counties was premature until a claim was filed in that county, Plaintiff brought this constitutional challenge in good faith. Thus, as this Court found in *Rodriguez* when it assumed jurisdiction, the Plaintiff here brought "in good faith" a constitutional claim in which "[t]his Court has never passed on the exact issue." *See Rodriguez,* 996 S.W.2d at 52. Accordingly, this Court has jurisdiction.

**II. Respondents Mis-characterize the Claim as Moot.**

Respondents mis-characterize the nature of Plaintiff's claim as being a broad challenge to the original version of the state's Concealed Carry funding

mechanism, a question addressed by the Court in *Brooks v. State*, and one ultimately addressed by the Legislature when it amended the law. Rather, Plaintiff's claim goes specifically to the constitutional ripeness in Ste. Genevieve County, a claim resulting from this Court's conclusion in *Brooks* that until petitions like Mr. Taylor's were brought, that "disposition as to counties other than the four ruled upon was premature." 128 S.W.3d at 849.

Had this Court intended the result Respondent suggests, it would have ruled the Concealed Carry law unconstitutional as to all counties. Instead, this Court required claims to be brought county by county to prove they had processed applications in order to show the ripeness of the constitutional violation in each specific county. That is precisely what Plaintiff Taylor did when he brought his lawsuit here. And, despite the Court's recognition of the constitutional infirmities inherent in the Concealed Carry Law as originally enacted, this Court has never ruled that the law operated unconstitutionally in Ste. Genevieve County; indeed it specifically refused to render the law unconstitutional in any but the four counties in which evidence was presented, and accordingly mandated that the instant claim be brought to prove up the constitutional violation here. Any other interpretation would leave plaintiff without any remedy at law, since the Court in *Brooks* expressly refused to issue a ruling as to the constitutional violations in any but the

four counties in which evidence of the constitutional violation was offered. Indeed, Plaintiff would be quite pleased if Respondent's interpretation were correct, as it would have relieved him of the burden of pursuing this claim in to remedy the constitutional infirmity of the law in Ste. Genevieve County.[1] However, the Court in *Brooks* made clear that its ruling would apply only to the four counties in which the evidence was offered and that separate claims would have to be brought in any other counties to assert the constitutional violation as to that county.[2] That is precisely what Mr. Taylor did.

The respondents' argument that the amendment of the original Concealed Carry law renders Mr. Taylor's claim moot is also misplaced. Unlike the cases cited by Respondents, in which the amendment or repeal of a law directly impacted the nature of the rights of the parties at that moment, here, the amendment of the

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1 The dissent notes that the *Brooks* holding, by refusing to rule as to all Missouri's counties, "will merely result in unnecessary adjudications in the remaining Missouri counties," 128 S.W.3d at 854 and "will result in saddling these taxpayers with the unnecessary expense of the litigation involved . . ." Id., fn7 (White, J., dissenting).

2 The *Brooks* holding asserts "that nothing less than particularized evidence is required from each county for each individual claim to become ripe – only then will the court agree to recognize the obvious Hancock violation on a county by county basis." 128 SW3d at 854, fn 7 (White, J., dissenting)

Concealed Carry Law does nothing to cure the constitutional deficiency brought by the County's forced compliance with the law prior to the time it was amended. Respondent's cite *C.C. Dillon Co. v. City of Eureka,* 12 S.W.3d 322, 325 (Mo. banc 2000) for the proposition that, "A cause of action is 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." Here, unlike in *C.C. Dillon*, the amendment of the law does not undue its unconstitutionality prior to its amendment, which caused the county to incur increased unfunded costs. Thus there remains the opportunity for the case to have a "practical effect on an existing controversy," as the prior funding mechanism has *never* been declared unconstitutional in Ste. Genevieve County. That the County is no longer operating under the unconstitutional funding mechanism does not obviate that it did, nor does it obviate the injury to taxpayers arising from that unfunded mandate. Under the Respondent's interpretation, this constitutional deficiency would be left without remedy, contravening the meaning and intent of the Hancock Amendment, which is to protect taxpayers by preventing counties from being forced to comply with mandates for which the legislature has not appropriated funds to cover. Prior to the law's amendment, Ste. Genevieve County was forced to comply with mandates, notwithstanding Respondent's

suggestions that it could voluntarily comply, causing it to incur costs that the legislature did not fund. Plaintiff applauds the fact that the legislature ultimately corrected the funding problem, but, unless heard by this court, the Plaintiff is left without remedy for the constitutional violations that were forced upon the taxpayers of Ste. Genevieve County by the unfunded mandate prior to its amendment. Though the legislature included language in the amended law indicating that it had originally intended to provide a funding mechanism to cover counties' increased costs, the fact is, that the original law clearly and explicitly did not provide such a mechanism, as spelled out in Appellant's principal brief. Rather, it expressly limited the way in which the fund could be used, and, despite Respondents' attestations to the contrary, cannot be retroactively applied. Ste. Genevieve County had to rely on the clear language of this law, and was forced to carry out the mandates of the Concealed Carry Act as originally enacted and to incur increased costs without any funding mechanism provided by the legislature. The taxpayers thus suffered injury, and neither the *Brooks* case nor the subsequent amendment of the law remedy this unconstitutionality. Accordingly, the case is not "moot" as argued by Respondents.

Respondents' reliance on *In Re BT*, 186 S.W.3d 276 (Mo. 2006) (Respondents' brief at 18) is also misplaced. In *BT,* the appellant was addressing

the application of the repealed law to his current predicament (whether a conviction automatically precluded him having custody of his son). The court ruled the claim became moot when the statute in question was repealed and replaced with a statute explicitly giving a judge discretion to decide whether or not the conviction should impact his custody rights. *Id.* at 277. This is not analogous to the case here, in which Plaintiff doesn't challenge the constitutionality of the original Concealed Carry Act overall (which was addressed in *Brooks* and ultimately by the legislature in its subsequent amendment of the law), but rather raises the constitutional ripeness as to Ste. Genevieve County in particular, a claim that was (and remains) ripe as long as plaintiff can show that the county did in fact incur increased costs for new or expanded activities. That is precisely what the plaintiff has done.

The Respondents also mis-characterize the savings laws when they argue that not even the savings statute "'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" (Respondents' brief at 22). This completely mis-characterizes Plaintiff Taylor's claim. Plaintiff did not challenge a provision that was already declared unconstitutional, nor seek a second declaration

concerning its constitutionality. Rather, as described in detail above, Plaintiff brought a new and distinct claim when it was ripe, as this Court's precedent required him to do. His claim does not seek a broad declaration of the law's constitutionality, but rather a more specific declaration of the constitutional infirmities in Ste. Genevieve County. The Court in *Brooks* did not – and expressly refused to – rule on the constitutional deficiencies in Ste. Genevieve County and any but the four specific counties it listed, and required taxpayers any other county to bring their own separate claims of constitutional ripeness. That is precisely what Mr. Taylor did. Thus, Respondent's characterization of the vast flood of claims implied by Appellant's line of reasoning ("Indeed if there were such a 'right', the courts would be forever clogged by different parties pursuing virtually the same suit") is not apt. Plaintiff is not bringing the same suit again, but rather doing precisely what this court mandated in *Brooks* when it held that specific claims of the constitutional infirmities would have to be brought county by county. 128 S.W.3d at 849. The effect of *Brooks* is that for each additional county, a taxpayer must "seek a declaratory judgment that the Conceal and Carry Act violates the Hancock Amendment" in that county by demonstrating any additional cost to the county. *Id.* at 854 fn 7 (White., J., dissenting). And while in this *particular* circumstance, this could result in similar Hancock claims filed by taxpayers in

counties across the state, that result is mandated by the Court in *Brooks*.[3] In contrast to Respondent's characterization, nothing in Plaintiff's argument suggests that application of the savings statute would allow persons to bring suits on matters already ruled unconstitutional.

Further, nothing supports Respondent's claim that the subsequent amendment to the statute nullified this Court's ruling in *Brooks.* This case is not analogous to *Jones v. State Highway Comm'n*, 557 S.W.2d 255 (Mo. Banc 1977), on which Respondents rely, in which this Court abrogated the general doctrine of sovereign immunity, only to have the legislature later restore sovereign immunity to the status it previously held. *See State v. Moore,* 657 S.W.2d 32 (Mo. Ct. App. 1983). Here, the statute was amended after this Court's decision in books to be made consistent with *Brooks* – not to nullify it or reduce the law to its pre-*Brooks* status.

Respondents argue that the funding mechanism affords Mr. Taylor no vested right on grounds that it is a remedial statute. To the contrary, under Art. X, Section 23 of the Missouri Constitution, the Hancock Amendment precisely provides that as a taxpayer in Ste. Genevieve County, Mr. Taylor has a vested interest in the funding mechanism. In *Arie v. Intertherm, Inc.*, cited by Respondents, the court

3 The holding "will merely result in unnecessary adjudications in the remaining Missouri counties." *Brooks,* 128 S.W.3d at 854 (White, J., dissenting).

found that the plaintiff, Mrs. Arie, had "acquired a vested interest" in a punitive damage award and "could not be deprived of her rights" in the judgment despite the repeal and re-enactment of the applicable award statute, which, the court noted, did not take effect until almost a year after she was awarded the damages. *Arie,* 648 S.W.2d 142, 159 (Mo. App. E.D. 1983) (overruled on other grounds). Accordingly, the court found the savings statutes, §§ 1.170 and 1.180 RSMo, to be controlling, and concluded that the new punitive damage law "may not be applied retroactively, in this case," and that Mrs. Arie could not be deprived of her right to her punitive damage award by the retroactive application of a new statute precluding punitive damages that was enacted after her vested interest accrued (at the time she got the award). *Id.* Similarly here, the amended law cannot be applied retroactively. As in *Arie,* here the Missouri legislature did not repeal and replace the flawed funding mechanism until after Mr. Taylor's vested interest in the unconstitutional funding mechanism accrued – at the point in which the County processed any applications under the old funding regime.[4] Once Ste. Genevieve

4 As Justice White noted, " . . .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. . ." *Brooks*, 128 S.W.3d at 854 fn 7, (White, J.,

County processed a concealed carry permit application under the unfunded and thus unconstitutional regime, the plaintiff, as a taxpayer, acquired a vested interest in the claim that is not eradicated by the subsequent amendment to the law. At that point, the constitutional violation occurred, and his vested status as a taxpayer accrued. That violation has never been declared unconstitutional or remedied. Accordingly, as the court found §§ 1.170 and 1.180 controlling in *Arie,* Appellant's arguments, set forth in his principal brief, concerning the applicability of Missouri's savings statutes, §§ 1.170 and 1.180, should control here as well.

Respondents further mis-characterize Appellant's savings statute argument by suggesting that they would "render the concept of mootness meaningless when the legislature repeals" a constitutionally flawed statute or that "the legislature could never, as a practical matter, 'fix' a flawed statute." (Respondents' brief at 23). Of course it can. The legislature did fix the flawed funding mechanism in the Concealed Carry law. And, the Respondents are correct that such acts can sometimes affect on-going litigation, as it did in *In Re BT*, where the repeal of the applicable law directly affected the very right being argued by the litigant. In that case, the fact that the legislature changed the law to give a judge discretion to determine how a conviction should affect a parent's custody rights, rendered moot the father's claim that the law unconstitutionally imposed an automatic bar to

dissenting).

custody based on a criminal conviction. *BT*, 186 S.W.3d at 277. As set forth above, there is not an analogous situation here. The amendment of the law here does not void the constitutional infirmity brought by the County's forced compliance with the unfunded mandate *prior* to the law's amendment. That infirmity will remain without remedy unless declared unconstitutional by this Court. Thus, declaratory judgment is in order and is a proper remedy in this case.

III. **The County's Increased Costs are Not Speculative; That it Processed One Application is Enough to Satisfy the Hancock Requirement Under *Brooks.***

Respondents argue that the Appellant has failed to sufficiently demonstrate a Hancock violation in St. Genevieve County. However, because by simply processing a single application, each county incurs specific uniform costs, which have been established and recognized by this Court, the existence of a single application is enough to satisfy the constitutional requirement. As Justice White noted in his dissent in *Brooks*, "Following today's holding, 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 . . .*"* Brooks, 128 S.W.3d at 854, fn 7 (White, J., dissenting). Here, Appellant has met this burden. As spelled out in detail in Appellant's principal brief, here the County has admitted that it incurred costs for a number of new or increased services or activities in complying with the Concealed Carry Act as originally enacted. The Plaintiff need not have plead exact dollar amounts concerning the County's increased costs, but rather "plaintiffs need *only* show that the increased costs will be more than *de minimus*." *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 an arduous standard. Previous decisions issued by this Court make clear that an unfunded mandate need not be large to constitute a Hancock violation. In *Boone County Court v. State*, 631 S.W.2d 321 (Mo. 1982), the Court declared that an unfunded mandate of just $100 violated the Hancock Amendment. In *Brooks*, an expenditure of as little as $38 to conduct the required fingerprint analysis was enough to contravene the Hancock Amendment. 128 S.W.3d at 849. The County here, by its own admission, conducted the same fingerprint analysis, and thus this case is not like *Miller v. Director of Revenue*, 719 S.W.2d 787, 789 (Mo. banc 1986), relied upon by Respondents, where the Court found the Hancock claim did

not rest on any evidence of increased costs, but rather on "mere speculation." *Id.*

This Court in *Brooks* found the $38 fingerprint analysis sufficient to meet the standard to prove a Hancock violation, even without evidence as to how many applications might be processed. "Although there was little evidence to show the estimated number of permit applicants in each county, it is not disputed that there will be more than a few. The fact remains, though, that even if there are only a few, for each on the increased cost to each county will be at least $38, and as a result the case is ripe in each county." *Id.* at 849. Accordingly, the Court sustained the Hancock challenges as to those counties. The claim is similarly ripe here, since Ste. Genevieve has also processed the fingerprint analysis.

The Respondents don't dispute that the $38 cost of conducting a fingerprint analysis is sufficient to constitute a Hancock violation (Respondents' brief at 32), though, inexplicably, despite their own admissions that they conducted the very same fingerprint analysis (among other new increased activities), they argue that the Plaintiff failed to demonstrate that it met its burden under Hancock.

In this case, Respondents admit that the County conducted the same fingerprint analysis that proved fatal to the counties in *Brooks*. (Defendants' Responses to Admissions at 7). However, they indicate that they requested that the individual applicants send the money to the State. (Defendants' Responses to

Admissions at 11). This does not obviate the Hancock violation as, this Court in *Brooks* recognized that in order to process any application and issue a conceal carry endorsement, state law made it necessary for any *county* "to engage the Missouri State Highway Patrol to conduct a 'fingerprint analysis,' which is part of each applicant's background check," and that this was sufficient to create a Hancock violation. 128 S.W.3d at 849. The defendants admit that the County bore this obligation. (Defendants' Responses to Admissions at 40, 41). And, as this Court recognized in *Brooks,* there is a fixed cost of $38 for each fingerprint analysis, "which is the sum charged by the Patrol for each case." 128 S.W.3d at 849. The County admits to issuing concealed carry endorsements in Ste. Genevieve County (Defendants' Responses to Admissions at 2), which necessarily required it to engage the Highway Patrol to do the fingerprint analysis, and the County admits that it did conduct the fingerprint analysis (Defendants Responses to Admissions at 7), and admits that it incurred increased activities or services, costs, and expenses in order to issue the permits (Defendants Responses to Admissions at 14-16, 19, 20, 47). By their own admission, their increased costs are not speculative.

In order to process any applications, Ste. Genevieve County was required to engage the Missouri State Highway Patrol to conduct the fingerprint analysis. Respondents admit that they did this. The set fee established by the Missouri State

Highway Patrol for this service is $38. *Brooks* at 849. This cost was not appropriated by the legislature in the Conceal Carry Act as originally enacted. This Court has ruled that this is sufficient to prove the Hancock violation. *Id.* Accordingly, because Plaintiff has sufficiently and adequately proven that Ste. Genevieve County incurred more than de minimus costs that were not appropriated by the legislature, "the case is ripe" as to Ste. Genevieve County, and plaintiff should prevail. *See Brooks*, 128 S.W.3d at 849.

## CONCLUSION

For the reasons set forth in Appellant's Principal Brief and in its Reply, this Court should reverse the judgment of the Circuit Court of Ste. Genevieve County, grant declaratory relief to Plaintiff, and award 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 22nd day of September, 2007, one true and correct copy of the foregoing Reply brief, and one disk containing same, 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 4422 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.

_____
Denise D. Lieberman, Counsel for Appellant