IN THE
SUPREME COURT OF MISSOURI

No. SC87405

JACKSON COUNTY, MISSOURI

Respondent,

v.

STATE OF MISSOURI, *et al.*,

Appellants.

Appeal From The Cole County Circuit Court,
The Honorable Richard G. Callahan

Appellants' Brief

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Introduction

In 2005, the 93rd General Assembly enacted a new § 67.2555 of the Missouri Revised Statutes, providing as follows:

> Any expenditures of more than five thousand dollars made by the county executive of a county with a charter form of government and with more than six hundred thousand but fewer than seven hundred thousand inhabitants must be competitively bid.

Jackson County, currently the only county in the State with a charter form of government and more than 600,000, but less than 700,000 inhabitants, filed suit in the Circuit Court of Cole County, seeking to have § 67.2555 declared invalid and its enforcement enjoined. The trial court accepted at face value the County's assertion that § 67.2555 violated the special law prohibition in Article III, § 40(30) of the Missouri Constitution and did not address the County's sundry other constitutional challenges.

On appeal, the Court should set aside the trial court's judgment. The County failed to make out a *prima facie* case that § 67.2555 violated Article III, § 40(30); judicially noticeable facts and the State's trial evidence show that the General Assembly had a clear and rational basis for § 67.2555's classifications; and the trial court's rationales for holding the law invalid are wholly unsound. In addition, there is no merit to any of the County's alternate theories of invalidity.

Jurisdictional Statement

The State of Missouri and the Attorney General, Jeremiah W. (Jay) Nixon ("State") appeal from a November 17, 2005 judgment of the Circuit Court of Cole County, the Honorable Richard G. Callahan, declaring § 67.2555, RSMo Cum. Supp. 2005, unconstitutional under Article III, § 40(30) of the Missouri Constitution.

Because this appeal involves the validity of "a statute ... of this state," it is within the exclusive jurisdiction of this Court. *See* Mo. Const. art. V, § 3 (1875), as amended.

Statement of Facts

During its regular session, the 93rd General Assembly truly agreed and finally passed House Bill 58 ("H.B. 58"). L.F. 210; 231. Among other things, H.B. 58 enacted a new § 67.2555 of the Missouri Revised Statutes, providing as follows:

> Any expenditures of more than five thousand dollars made by the county executive of a county with a charter form of government and with more than six hundred thousand but fewer than seven hundred thousand inhabitants must be competitively bid.

L.F. 83.

The Governor signed H.B. 58 into law on July 7, 2005, putting the legislation on track to become effective on August 28, 2005. L.F. 231.

On August 26, 2005, Jackson County, currently the only county in the State with a charter form of government and more than 600,000, but less than 700,000 inhabitants, filed suit in the Circuit Court of Cole County, seeking to have § 67.2555 declared invalid and enjoined. L.F. 1-10. The County's petition asserted (1) that § 67.2555 encroached on the County's right to operate under a charter form of government under Article VI, § 18 of the Missouri Constitution and (2) that H.B. 58 was passed in violation of the procedural limitations set by Article III, § 21 and § 23.[1]

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[1]The petition also challenged the validity of two other provisions of H.B. 58 – § 115.348 (which prohibits persons with federal criminal records from qualifying as

That same day, the Honorable Richard G. Callahan issued an *ex parte* order temporarily restraining § 67.2555 from going into effect. On August 29th, over the objections of the State, Judge Callahan extended the restraining order until September 7, 2005.

On September 2, 2005, the County filed an amended petition that retained the (1) Article VI, § 18 and (2) Article III, § 21 and § 23 claims, and added arguments that § 67.2555 was invalid (3) under Article III, § 40(30) of the Missouri Constitution as a special law, because it did not apply to all counties with county executives, (4) under Article III, § 42, for not having been passed in accordance with special law notice requirements, and (5) under the vagueness and overbreadth doctrines, for failing to distinguish between various types of expenditures. L.F. 221-25.

The County's amended petition also added several paragraphs regarding the effect of § 67.2555. L.F. 212-16. Specifically, the County claimed that if it complied with § 67.2555, the County would have to seek competitive bids:

> for utility services, regardless of whether there were other companies that

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candidates for public office) and § 64.940 (which requires certain sports complex authorities to competitively bid expenditures greater than $5,000). L.F. 6. But the County was unsuccessful in pressing these challenges below, and they are not at issue in the State's appeal in this case. *See* L.F. 235-47. The validity of § 115.348 is the subject of the State's appeal in *Rizzo, et al. v. State, et al.*, SC87550, which is scheduled for argument on April 6, 2006.

could provide electrical, gas, and water services, thereby putting itself at risk of having those services cut off;

in the hiring of architects and engineers, in contravention of a state requirement that architectural, engineering, and land surveying services be negotiated "on the basis of demonstrated competence and qualifications for the type of services required and at fair and reasonable prices," § 8.285, RSMo; and

in the hiring of outside legal counsel, requiring it to improperly disclose confidential information.

L.F. 212-16.

The amended petition further asserted that § 67.2555 would impair the County's ability to obtain government software and maintenance agreements, to make emergency purchases, to resell brand name golf equipment at county golf courses, to purchase voting machines, to fund not-for-profit agencies, and to enter into certain term and supply contracts. *Id.*

The State denied that Jackson County was entitled to relief, and noted that the County's allegations concerning § 67.2555's effect consisted of legal conclusions and argument. L.F. 230-33.

On September 8, 2005, Judge Callahan converted the temporary restraining order into a preliminary injunction, again over the State's objections, and set the matter for trial.

At the September 28th trial, the court heard arguments of counsel and admitted into evidence two exhibits, both of which were offered by the State. (The County had previously entered into the record a copy of the Jackson County charter.) Defendant's Exhibit 1 was a March 31, 2004 Kansas City Star article reporting on a "wide-ranging" federal probe into "no-bid contracts issued by [the Jackson County] County Executive Katheryn Shields," among other things. App. 15 (Def. Ex. 1, p. 1). Defendant's Exhibit 2 was an August 27, 2005 Kansas City Star article further detailing the federal investigation into Shields' "[n]o-bid consulting contracts given to campaign supporters" and "[c]onsulting contracts given to county employees who were forced out or departed abruptly." App. 19 (Def. Ex. 2, p. 1).

At the close of the trial, the trial court took the case under advisement. On November 17, 2005, it entered a final order and judgment that declared § 67.2555 invalid as a special law and permanently enjoined its effect. *See* App. 1-13 (Order).

While the trial court's order recognized that Missouri courts have long viewed laws with population-based classifications as permissible general laws, it concluded that § 67.2555 had to be set aside as a special law because it bore no rational relationship to a legitimate legislative objective. App. 6. This was because, in the court's view, § 67.2555 would cause problems in the day-to-day activities of the County, as alleged in the First Amended Petition – *i.e.,* § 67.2555 would endanger the County's ability to maintain utility services, would require it to competitively bid architecture and engineering services in violation of state law, and would impair the County's ability to make emergency purchases, purchase voting

machines, etc. App. 6-8.

The court further concluded that § 67.2555 was a special law because, in its view, the legislature acted irrationally by not extending it to all county executives:

> If the legislature was truly interested in avoiding corruption in regard to the awarding of personal service contracts, it should have made the law applicable to all county executives. The issue of corruption and the effort to fight it legislatively should apply statewide, and not just to Jackson County. Corruption is not exclusive to counties with populations between six hundred thousand (600,000) and seven hundred thousand (700,000).

App. 8.

Having found § 67.2555 invalid as a special law, the court did not consider the County's alternate constitutional challenges. App. 9-10.

The County moved for a new trial on December 16, 2005. L.F. 238-54. Judge Callahan denied its motion on January 5, 2006. L.F. 255.

The State filed a notice of appeal on January 10, 2006. L.F. 256. The County filed a cross appeal on January 18, 2005. L.F. 271.

Points Relied On

I.

The trial court erred in holding § 67.2555 invalid under Article III, § 40(30) of the Missouri Constitution because the County failed to bear the burden imposed on one who challenges open-ended legislation like § 67.2555 under Article III, § 40(30), *i.e.,* to prove that at least one of the law's classifications does not rest upon any rational basis in that the County failed to make a *prima facie* showing that any of § 67.2555's classifications were irrational and because § 67.2555 is constitutional in that: (1) judicially noticeable facts concerning other county executives' powers and the State's evidence that the Jackson County county executive was under federal investigation for abuse of her contracting power show that the General Assembly had a clear and a rational basis for § 67.2555's classification scheme, and (2) the trial court's rationales for setting § 67.2555 aside (interference with day-to-day activities in the County, and failure to guard against potential corruption by other county executives) are unsound.

Mo. Const. art. III, § 40(30).

Treadway v. State, 988 S.W.2d 508 (Mo. banc 1999).

Tillis v. City of Branson, 945 S.W.2d 447 (Mo. banc 1997).

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

State ex rel. Public Defender Comm'n v. County Court of Greene County, 667 S.W.2d 409 (Mo. banc 1984).

II.

There is no alternate ground on which the trial court's judgment could be sustained because: (1) the County's claim that § 67.2555 is invalid under Article VI, § 18 of the Missouri Constitution cannot be squared with the plain language or legislative history of Article VI, § 18; (2) the County's Article III, § 21 change-of-purpose challenge lacks merit, because the claimed offending addition to H.B. 58 (§ 115.348) is germane to the original purpose of the bill; (3) the County's Article III, § 23 challenges fails because H.B. 58's provisions, and § 67.2555 in particular, fairly relate to political subdivisions, any arguably unrelated provisions would be severable, and the clear-title argument was not properly raised and lacks substantive merit; (4) the County's vagueness and overbreadth arguments fail because counties are not "persons" entitled to due process protection, and, in any event, § 67.2555 uses terms comprehensible to persons with ordinary intelligence and does not substantially prohibit expressive conduct or speech; and (5) the County's Article III, § 42 challenge fails because the General Assembly did not need to follow special law notice requirements because § 67.2555 is not a special law.

Mo. Const. art. VI, § 18.

Mo. Const. art. III, § 21.

Mo. Const. art. III, § 23.

Mo. Const. art. III, § 42.

U.S. Const. Am. XIV, s.1.

Mo. Const. art. I, § 10.

Stroh Brewery Co. v. State, 954 S.W.2d 323 (Mo. banc. 1997).

Missouri State Medical Ass'n v. Missouri Dept. of Health, 39 S.W.3d 837 (Mo. banc 2001).

Carmack v. Director, Missouri Dept. of Agriculture, 945 S.W.2d 956 (Mo. banc 1997).

City of Chesterfield v. Director of Revenue, 811 S.W.2d 375 (Mo. banc 1991).

Standard of Review

Review of this judge-tried case is governed by *Murphy v. Carron*, 536 S.W.2d 30 (Mo. banc 1976). Under *Murphy*, the Court must reverse the trial court's judgment if there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. *Id.* at 32.

Argument

I.

The trial court erred in holding § 67.2555 invalid under Article III, § 40(30) of the Missouri Constitution because the County failed to bear the burden imposed on one who challenges open-ended legislation like § 67.2555 under Article III, § 40(30), *i.e.,* to prove that at least one of the law's classifications does not rest upon any rational basis in that the County failed to make a *prima facie* showing that any of § 67.2555's classifications were irrational and because § 67.2555 is constitutional in that: (1) judicially noticeable facts concerning other county executives' powers and the State's evidence that the Jackson County county executive was under federal investigation for abuse of her contracting power show that the General Assembly had a clear and a rational basis for § 67.2555's classification scheme, and (2) the trial court's rationales for setting § 67.2555 aside (interference with day-to-day activities in the County, and failure to guard against potential corruption by other county executives) are unsound.

Article III, § 40(30) of the Missouri Constitution prohibits the General Assembly from passing "any ... special law ... where a general law can be made applicable." The Court has interpreted Article III, § 40(30), and its predecessor, Article IV, § 53(32) of the 1875 Constitution, to preclude two types of legislation directed at political subdivisions: (1) legislation that singles out political subdivisions based on permanent characteristics, such

as geographical location or constitutional status on a particular date ("special" or "not open-ended" legislation); and (2) legislation that distinguishes among political subdivisions based on mutable characteristics, such as county classification, population, or charter status ("open-ended" legislation), where those characteristics do not rationally relate to a legislative purpose. *See Treadway v. State*, 988 S.W.2d 508, 510-11 (Mo. banc 1999); *Tillis v. City of Branson*, 945 S.W.2d 447, 448-49 (Mo. banc 1997); *O'Reilly v. City of Hazelwood*, 850 S.W.2d 96, 99 (Mo. banc 1993).

Where a law contains a facially special (*i.e.,* not open-ended) classification, the usual rule that a law will be held constitutional absent a showing of clear and undoubted invalidity is replaced by a presumption of unconstitutionality that can be overcome only if *the State* demonstrates that there is a "'substantial justification' for the special treatment." *Tillis*, 945 S.W.2d at 448-49 (internal quotations omitted); *O'Reilly*, 850 S.W.2d at 99.

But where a law's classifications are facially open-ended, the usual presumption of constitutionality remains in place, and the law must be upheld unless *the challenger* "'carr[ies] the burden of showing that [at least one of the law's classifications] does not rest upon any reasonable basis, but is essentially arbitrary.'" *State ex rel. Public Defender Comm'n v. County Court of Greene County*, 667 S.W.2d 409, 413 (Mo. banc 1984), quoting *State ex inf. Barrett ex. rel. Bradshaw v. Hedrick*, 241 S.W. 402, 420 (Mo. banc 1922). At a minimum, the challenger must make a *prima facie* "showing ... before the trial court regarding the reasonableness of the exclusion." *Public Defender Comm'n*, 667 S.W.2d at

413 (judgment that open-ended law is valid is sustainable on appeal where challenger has failed to make out a *prima facie* case). And to succeed, the challenger must convince the Court "'beyond a reasonable doubt that there are no distinctive circumstances ... which reasonably justify'" the challenged open-ended classification. *State v. Cushman*, 451 S.W.2d 17, 19 (Mo. banc 1970), quoting *Bradshaw*, 241 S.W. at 420.[2]

In this case, the County did not argue that § 67.2555 is a facially special law subject to a presumption of unconstitutionality. *See* L.F. 221-22 (Am. Pet.).[3] Rather, the County

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[2]The Court has said that this test "'involves the same principles and considerations that are involved in determining whether [a] statute violates equal protection in a situation where neither a fundamental right nor suspect class is involved, *i.e.,* where a rational basis test applies.'" *Fust v. Attorney General*, 947 S.W.2d 424, 432 (Mo. banc 1997), quoting *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 832 (Mo. banc 1991). Accordingly, this brief includes citations to equal protection cases where appropriate.

[3]Nor could such an argument have been successful, had it been made. The Court has definitely held that both of § 67.2555's limiting factors – charter government status and population range untied to historical facts – are open-ended classifications. *See Zimmerman v. State Tax Comm'r*, 916 S.W.2d 208, 209 (Mo. banc 1996) (per curiam) (limitation as to "first class charter counties" is "'open-ended' in that other counties may join the class upon becoming first class counties and adopting a home rule charter"); *State ex rel. City of Blue Springs v. Rice*, 853 S.W.2d 918, 921 (Mo. banc 1993) (classifications based on population

proceeded solely on the theory that § 67.2555 is invalid "open-ended" legislation because, in its view, there was no rational reason for the General Assembly to treat county executives in charter counties with 600,000 to 700,000 inhabitants differently than county executives in counties outside that population range insofar as competitive bidding requirements are concerned. L.F. 222.

The circuit court accepted this argument wholesale. App. 6-8. And it demonstrably erred in so doing, because, as discussed below: (A) the County failed to make a *prima facie* showing that any of § 67.2555's classifications were irrational, (B) judicially noticeable facts and the State's trial evidence show that the General Assembly had a clear and a rational basis for § 67.2555's classification scheme, and (C) the trial court's rationales for setting § 67.2555 aside are unsound.

A. The County failed to make a *prima facie* showing that § 67.2555's classifications were irrational.

In its pleadings and at trial, the County simply asserted, *ipse dixit*, that § 67.2555's population criteria was arbitrary, put into the record a copy of the Jackson County charter, and noted that Jackson County currently has the only county executive that would be subject to § 67.2555's requirements. *See supra*, p. 15; L.F. 221-22.

That fell far short of a *prima facie* case. Under this Court's precedents, the County

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"are open-ended when it is possible that a political subdivision's status under the classification could change").

needed, at a minimum, to put forward some evidence (or call the trial court's attention to judicially noticeable facts) that could support an inference that § 67.2555 arbitrarily excluded county executives in other charter counties who were identically situated, insofar as competitive bidding requirements are concerned, to county executives subject to § 67.2555. *See Public Defender Comm'n*, 667 S.W.2d at 413. Because the County utterly failed to make out a *prima facie* case, the circuit court should have ruled that the County's special law challenge failed as a matter of law. *See id.*; *see also ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 381 (Mo. banc 1993) (defending party that does not bear burden of persuasion at trial shows entitlement to judgment as a matter of law where claimant cannot produce evidence sufficient to allow the fact-finder to establish at least one element of the claimant's claim).

B. Judicially noticeable facts and the State's trial evidence show that the General Assembly had a clear and rational basis for § 67.2555's classification scheme.

Even if this Court were inclined to overlook the County's failure to submit (or articulate) a *prima facie* case, the circuit court's judgment still could not stand. A court confronted with a rational-basis challenge to legislation must ask itself whether "any state of facts reasonably may be conceived to justify" the legislature's action. *Mahoney v. Doerhoff Surgical Services, Inc.,* 807 S.W.2d 503, 512 (Mo. banc 1991), quoting *McGowan v. Maryland*, 366 U.S. 420, 425 (1961). Here, one such basis is readily apparent. Currently

there are only three Missouri counties that have adopted a charter form of government – Jackson County (pop. 662,959), St. Charles County (pop. 329,940), and St. Louis County (pop. 1,004,666).[4] Through their charters, each of these counties have chosen to structure their respective governments differently from the remaining counties in the state (which operate under the traditional county commission form of government). Jackson County's charter grants the county executive unrestricted authority to "Employ experts and consultants in connection with any of the functions of the county." App. 25 (Jackson County Charter, Article III, § 6.2).[5] The charters of St. Louis and St. Charles counties, in contrast, authorize their respective county executives to employ experts and consultants only insofar as that employment is "by and with the approval of" those counties' councils. App. 28 (St. Louis Charter, Article III, § 3.050.2); App. 34 (St. Charles Charter, Article III, § 3.604).[6]

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[4]A county's charter, and its population, may be judicially noticed. *See Tonkin v. Jackson County Merit System Comm'n*, 599 S.W.2d 25, 27 (Mo. App. W.D. 1980) (county charter); *State ex rel. Alton R. Co. v. Public Serv. Comm'n*, 70 S.W.2d 52 (Mo. 1934) (per curiam) (county population). The listed population figures are the U.S. Census Bureau's 2005 estimates, which are available at http://factfinder.census.gov/.

[5]The complete text of the Jackson County charter is available at http://www.co.jackson.mo.us/pdf/JCMoChrtr.pdf.

[6]The complete text of the St. Louis County charter is available at http://www.stlouisco.com/county_charter/. The St. Charles County charter is available

This difference in the authority of the Jackson County county executive on the one hand, and the St. Louis and St. Charles county executives on the other, is a clear and rational foundation for the General Assembly's decision to impose competitive bidding requirements that, at present, apply only to Jackson County. This is because the General Assembly could rationally relate the Jackson County county executive's greater authority to enter into personal service and consulting contracts to a greater need for competitive bidding restrictions – which have long been recognized as a means "'to guard against favoritism, improvidence, extravagance, fraud and corruption in the awarding of municipal contracts.'" *O. J. Photo Supply, Inc. v. McNary*, 611 S.W.2d 246, 248 (Mo. App. E.D. 1980), quoting 10 McQuillan, Municipal Corporations (3d Ed.) § 29.29.[7]

The rationality of General Assembly's classification scheme is further validated by the two Kansas City Star articles adduced at trial by the State. *See* App. 15-22. Those articles, which reported on the federal investigation into no-bid contracts entered into by the Jackson County county executive, show that the legislature had strong grounds to believe that

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at http://www.saintcharlescounty.org/DesktopDefault.aspx?tabid=126.

[7] *Cf. Blaske*, 821 S.W.2d at 832 (differences in duties and authority of designers and builders as compared to materialmen, owners, and operators supported a legislative distinction between groups in statute of repose); *Davis v. Jasper County*, 300 S.W. 493, 495-96 (Mo. banc 1927) (differences in duties of prosecutors in counties of differing populations and locations of court supported distinctions in salary levels).

there was a *pressing* and *present* need to protect the citizens of a county with a charter form of government and a population of 600,000 to 700,000 from a county executive who lacked adequate checks on her power to contract away public funds. *See Lincoln Credit Co. v. Peach*, 636 S.W.2d 31, 35 (Mo. banc 1982) ("'It is enough that there is an evil at hand for correction, and that it might be thought that ... (this) particular legislative measure was a rational way to correct it....'"), quoting *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 488 (1955).

C. The trial court's rationales are unsound.

Finally, the two reasons the circuit court gave for setting aside § 67.2555 as a special law cannot shore up the erroneously entered judgment. The first of these reasons – that § 67.2555 could cause problems in the day-to-day activities of the county – is based on mistaken conclusions about § 67.2555's effect that are not, in any event, relevant to the special law inquiry. An Article III, § 40(30) challenge emphatically is not an invitation for arm-chair legislating by the judiciary. The question for the court is whether a particular classification is proper, not "whether [a] law is just or unjust." *Davis v. Jasper County*, 300 S.W.493, 496 (Mo. banc 1927). And so arguments about whether the legislature chose "the best or wisest means to achieve its goals" – "no matter how plausible" – are not properly directed to the courts, but must go to the legislature. *Winston v. Reorganized School Dist. R-2, Lawrence Co.*, 636 S.W.2d 324, 328 (Mo. banc 1982).

Here, the circuit court's first rationale for setting § 67.2555 aside was just the sort of

legislative second-guessing that is not permitted under Article III, § 40(30). To make matters worse, the circuit court's second-guessing was based on erroneous conclusions about § 67.2555's requirements. A requirement that a county executive competitively bid certain expenditures does not mean that the county executive must accept the lowest bid for a project, no matter what the bidder's qualifications. Rather, it means that he or she must obtain bids to complete a project and must award "the contract to the responsible bidder best able to complete the project in a manner which is financially most advantageous to the community." Black's Law Dictionary 195 (6th Ed. 1991) (definition of "competitive bidding") (reproduced at App. 38). Accordingly, § 67.2555 will not, as the circuit court thought, preclude the County from purchasing acceptable voting machines, from contracting with qualified architectural and engineering firms, or otherwise impede the County in obtaining needed goods and services.[8]

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[8]The circuit court's conclusion that § 67.2555 would require the County to seek competitive bids for architectural work contrary to § 8.285 (App. 7) is also antithetical to the basic rule of statutory construction that courts must attempt to reconcile statutes and, if that is impossible, to conclude that the later-enacted statute controls where the two provisions are inconsistent. *See County of Jefferson v. Quiktrip Corp.*, 912 S.W.2d 487, 490 (Mo. banc 1995). Here, there is no repeal by implication, because § 67.2555 and § 8.285 are easily harmonized. The County could comply with both provisions by factoring into its competitive bidding calculus both the price *and* the quality of the architectural, engineering, and

The circuit court's other rationale for its decision – that § 67.2555 should have been given wider application because corruption is not exclusive to counties with populations between 600,000 and 700,000 – fares no better than the first. As the Court has long held, Article III, § 40(30) gives the General Assembly considerable leeway in addressing perceived problems:

> The Legislature in the exercise of its power to classify [under Article III, § 40(30)] is not required to trace with a hair line the boundaries of the class to which the resulting enactment shall apply. The question of classification is a practical one. A law may be directed to that class which is deemed to have the greater need for it. There may be omissions from the application of the law; the entire possible field does not have to be covered. There is bound to be some inequality resulting from any classification but unless it is unreasonable and arbitrary the classification must be approved.

State ex rel. Fire Dist. of Lemay v. Smith, 184 S.W.2d 593, 596 (Mo. banc 1945) (internal quotations and citations omitted).

Here, the General Assembly quite permissibly addressed itself "to the phase of the problem which seems most acute to the legislative mind." *Williamson*, 348 U.S. at 489. And so the circuit court was wrong to hold § 67.2555 invalid merely because it did not "cover every evil that might conceivably have been attacked." *McDonald v. Board of Election Comm'rs*, 394 U.S. 802, 808-09 (1969).

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surveying services being bid.

II.

There is no alternate ground on which the trial court's judgment could be sustained because: (1) the County's claim that § 67.2555 is invalid under Article VI, § 18 of the Missouri Constitution cannot be squared with the plain language or legislative history of Article VI, § 18; (2) the County's Article III, § 21 change-of-purpose challenge lacks merit, because the claimed offending addition to H.B. 58 (§ 115.348) is germane to the original purpose of the bill; (3) the County's Article III, § 23 challenges fails because H.B. 58's provisions, and § 67.2555 in particular, fairly relate to political subdivisions, any arguably unrelated provisions would be severable, and the clear-title challenge was not properly raised and lacks substantive merit; (4) the County's vagueness and overbreadth arguments fail because counties are not "persons" entitled to due process protection, and, in any event, § 67.2555 uses terms comprehensible to persons with ordinary intelligence and does not substantially prohibit expressive conduct or speech; and (5) the County's Article III, § 42 challenge fails because the General Assembly did not need to follow special law notice requirements because § 67.2555 is not a special law.

Because the Court is "primarily concerned with the correctness of the trial court's result, not the route taken by the trial court to reach that result," it is proper to consider the strength of the County's other theories of invalidity. *Business Men's Assur. Co. of America v. Graham*, 984 S.W.2d 501, 506 (Mo. banc 1999). As shown below, however, not one of

those alternate theories can sustain the judgment declaring § 67.2555 void.

A. Article VI, § 18 of the Missouri Constitution does not prohibit the General Assembly from imposing competitive bidding requirements on charter county officers.

In its pleadings and at trial, the County argued that § 67.2555 infringed on its right to operate under a charter form of government as provided by Article VI, § 18 of the Missouri Constitution. But "the legislative power of Missouri's General Assembly ... is plenary" unless expressly limited. *Board of Educ. of City of St. Louis*, 879 S.W.2d 530, 533 (Mo. banc 1994). And § 67.2555 does not fall within the only express limitation that Article VI places on the General Assembly's power to legislate *vis-à-vis* charter counties. That limitation appears in § 18(e) (entitled "Laws affecting charter counties – limitations") and prohibits only those laws which "provide for any ... office or employee of the county [other than judicial officers] or fix the salary of any of [the county's] officers or employees." Mo. Const. art. VI, § 18(e).

Further textual support for the General Assembly's authority to impose competitive bidding requirements on charter county officials can be found in Article VI, § 18(b). Section 18(b) expressly contemplates that charter county officers will be subject to "state" "laws" that affect their "powers and duties." *See* Mo. Const., art. VI, § 18(b) (charters adopted by counties must contain a provision "for the exercise of all *powers and duties* of ... *county officers* prescribed by the constitution and *laws* of the *state*") (emphasis added).

The debates over the 1945 Constitution, wherein the charter county provisions first appeared, also favor upholding § 67.2555. The debates show that Article VI, § 18 was framed not to restrict the General Assembly, but to give larger counties – primarily St. Louis and Jackson County – an ability to deal legislatively with unique local problems without first obtaining authorization from the General Assembly.[9] One delegate complained that these home rule provisions would confer on these counties "home rule in name only, but not in fact."[10] As this delegate accurately observed, Article VI, § 18 as proposed and ultimately adopted gives counties the right to set their "form of government" and "fix the salaries" of its officers, but leaves "the duties of [county] officers [to] still be prescribed by the General Assembly."[11]

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[9] *See* Debates of the Missouri Constitution 1945 p. 2711 ("two main advantages" of Article VI, § 18 were (1) "that it will allow the people in those counties ... to tackle their problems in their own way" and (2) relieve burden on General Assembly from having to pass so much special legislation dealing with the large urban communities in St. Louis County and Jackson County) (Statement of Mr. Bradshaw); *id* p. 2746 (purpose of Article VI, § 18 to "give the county additional power ... to enact some local regulations") (Statement of Mr. Mayer).

[10] Debates of the Missouri Constitution 1945 p. 2734 (Statement of Mr. Heege).

[11] *Id.* Other delegates likewise recognized that "the Legislature [could] change anything the county does" absent "any indirection" otherwise. *Id.*, p. 2779 (Statements of

In arguing to the trial court that its home rule charter provisions should take precedence over state law, the County relied heavily on cases dealing with the power of charter cities, such as *Kansas City v. J.I. Case Threshing Machine Co.*, 87 S.W.2d 195 (Mo. 1935), *Grant v. Kansas City*, 431 S.W.2d 89 (Mo. banc 1968), *Tremayne v. City of St. Louis*, 6 S.W.2d 935 (Mo. banc 1928), and *State ex inf. Taylor ex rel. Kansas City v. North Kansas City*, 228 S.W.2d 762 (Mo. 1950).

But those cases are inapposite because the Constitution's charter city provisions are different than the charter county provisions. The charter city provisions were first adopted in the 1875 Constitution and were an outgrowth of concern that the General Assembly was interfering, "by special act, in the local affairs of every community." *J.I. Case Threshing Co.*, 87 S.W.2d at 199. To alleviate this problem, the 1875 Constitution gave cities broad rights to frame and adopt their own governments, but required such charters to be "consistent with and subject to the Constitution and laws of the State." *Id.* (citing Mo. Const. of 1875, art. 9, §§ 16-17).

The precise wording of the charter city provisions gave courts difficulty "in determining ... what control remains in the Legislature to add to, change, or take away the rights and powers provided for and exercised under [city] charters." *Id.* at 200. Ultimately, this Court concluded that "as to corporate functions, the city should have free hand in framing its charter, but that as to government functions, which though permission or

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Messrs. Mayer and Ford).

delegation of the state, the city exercised, the state necessarily retained control" – a test that was difficult to apply. *Id.* at 202. *See also Grant v. Kansas City*, 431 S.W.2d at 92 (remarking on difficult application of corporate/government test). The difficulty was finally put to rest in 1971 with the adoption of Article VI, § 19(a), which provides that charter cities "have all the powers which the general assembly of Missouri has power to confer upon any city, provided such powers are consistent with the constitution of this state *and are not limited or denied ... by statute*." Mo. Const., Art. VI, § 19(a) (emphasis added). Now, the rule is that any city "charter provision that conflicts with a state statute is void." *City of Springfield v. Goff*, 918 S.W.2d 786, 789 (Mo. banc 1996).

The framers of the 1945 Constitution did not believe that counties were as suitable to home rule as were cities,[12] and they used different language in Article VI, § 18's charter county provision than the language used in the charter city provisions. And so, the Court concluded in the first case in which it interpreted Article VI, § 18 that prior cases were "of little help" in analyzing the county charter provisions because "the county charter provisions are wholly unlike others in the constitution" in that they "specifically provide what the county

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[12] *See* Debates of the Missouri Constitution 1945, p. 2711 (distinguishing cities and counties because a "city is primarily a unit of local self-government" whereas counties act with the State "as a unit"; and noting that as a matter of logic, all cities, but not any counties should have home rule, but that an exception for heavily populated counties with atypical problems was appropriate) (Statement of Mr. Bradshaw).

must do with respect to performing state and constitutional functions, and further states what the legislature cannot do." *State on inf. Dalton ex rel. Shepley v. Gamble*, 280 S.W.2d 656, 659, 662 (Mo. banc 1955).[13]

B. The addition of § 115.348 to H.B. 58 did not change the original purpose of the bill.

The County also argued that Article III, § 21's prohibition against amendments that "change [the] original purpose" of bills was violated when § 115.348 (a statewide prohibition against persons with federal criminal records from qualifying as candidates for public office)

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[13] It should be noted that there are a few Missouri decisions involving charter counties which have cited charter city cases. *See State ex rel. Cole v. Matthews*, 274 S.W.2d 286, 292 (Mo. banc 1954); *Hellman v. St. Louis County*, 302 S.W.2d 911, 916 (Mo. 1957); *Casper v. Hetlage*, 359 S.W.2d 781 (Mo. 1962); *State ex rel. St. Louis County v. Campbell*, 498 S.W.2d 833, 836 (Mo. App. St. Louis 1973); *& Information Technologies, Inc. v. St. Louis County*, 14 S.W.3d 60, 62 (Mo. App. E.D. 1999). But these citations, always without explanation or analysis, are unsound and inconsistent with *Shepley v. Gamble* and basic principles of constitutional interpretation. *See Spradlin v. City of Fulton*, 924 S.W.2d 259, 262 (Mo. banc 1996) ("rules for interpreting statutes," including the plain-meaning rule, "apply with equal force to the constitution"); *Board of Educ. of City of St. Louis*, 879 S.W.2d 530, 533 (Mo. banc 1994) ("the legislative power of Missouri's General Assembly ... is plenary" unless limited by another constitutional provision).

was added to H.B. 58.

Article III, § 21 challenges, like other procedural challenges are disfavored and are successful only where an act "clearly and undoubtedly" is given an amendment that is "not germane" to the "original purpose" of legislation. *Stroh Brewery Co. v. State*, 954 S.W.2d 323, 325-26 (Mo. banc. 1997) (internal quotations omitted). The "original purpose" of a bill is its "general purpose, not the mere details through which and by which that purpose is manifested and effectuated." *McEuen ex rel. McEuen v. Missouri State Bd. of Educ.*, 120 S.W.3d 207, 210 (Mo. banc 2003) (internal quotations omitted).

Here, the general purpose of the introduced version of H.B. 58 embraces all matters relating to political subdivisions. *See* L.F. 11-19 (introduced version of H.B. 58). Section 115.348 is self-evidently "germane" to this purpose because it sets qualifications for candidates for public office in political subdivisions like Jackson County. And so, the addition of § 115.348 did not "clearly and undoubtedly" violate Article III, § 21. *Cf. C.C. Dillon Co. v. City of Eureka*, 12 S.W.3d 322, 327 (Mo. banc 2000) (provision regulating billboards was "germane" to bill relating to transportation, because billboards could have impact on highways).

C. H.B. 58, as enacted, does not violate Article III, § 23.

The County's pleadings raised another disfavored procedural challenge – one based on Article III, § 23's single subject clause (L.F. 220) – and the County sought in its trial brief to mount an Article III, § 23 clear-title attack as well. Neither argument can support the trial

court's judgment.

1. H.B. 58, as enacted, does not contain multiple subjects.

The test for whether a bill violates the Article III, § 23's single subject clause is whether all provisions "fairly relate to the same subject, have a natural connection therewith or are incidents or means to accomplish its purpose." *Missouri State Medical Ass'n*, 39 S.W.3d at 840, quoting *Hammerschmidt v. Boone County*, 877 S.W.2d 98, 102 (Mo. banc 1994). The enacted bill is the only version relevant to single subject requirement. *Id.* The bill's title is the first place to look to determine its subject. *Id.*

In *State Medical Association,* the Court upheld the final version of a bill that mandated insurance coverage for early cancer detection, and also (1) made HIV-related information confidential; (2) mandated insurance for mental illness and chemical dependency; and (3) established a health insurance advisory committee, among other things. 39 S.W. 3d at 839. The Court held that, despite the number of chapters involved, the bill covered the single subject of "health services." *Id.* at 841. Similarly, in this case, all of the provisions in the final version of H.B. 58 relate in some way to the single subject of political subdivisions. *See* L.F. 44-208 (enrolled version). And so, no single-subject violation occurred.

Even if this Court found that some provision in H.B. 58 was unrelated to its "primary, core subject" of political subdivisions – a possibility the State denies – only the unrelated provisions should be struck. *See Carmack v. Director, Missouri Dept. of Agriculture*, 945

S.W.2d 956, 961 (Mo. banc 1997) (where bill contains a primary, core subject, matters within that subject may stand intact). Here, § 67.2555 must stand because it comes within H.B. 58's primary, core subject of regulating political subdivisions.

2. H.B. 58's title is adequate.

At trial, the County sought to raise an Article III, § 23's clear-title challenge to H.B. 58. This claim was not raised in the County's pleadings, and therefore was not properly before the trial court. *See City of St. Louis v. Missouri Comm'n on Human Rights*, 517 S.W.2d 65, 71 (Mo. banc 1974) (constitutional questions not raised in petition not properly before trial court).

Even if the clear-title claim had been properly raised, it would fail to persuade. Article III, § 23 requires only "that the title should indicate in a general way the kind of legislation that [is] being enacted." *Fust v. Attorney General*, 947 S.W.2d 424, 429 (Mo. banc 1997). And a "bill's multiple and diverse topics" may be "clearly expressed by their commonality – by stating some broad umbrella category that includes all the topics within its cover." *Missouri State Medical Ass'n*, 39 S.W.3d at 841. But if the title is (1) underinclusive or (2) too broad and amorphous to be meaningful, the clear-title requirement is infringed. *Home Builders Ass'n v. State*, 75 S.W.3d 267, 270 (Mo. banc 2002).

The County's improperly raised clear-title argument was that H.B. 58's title "relating to political subdivisions" was too "amorphous" to "give[] the reader [any] guidance," similar

to the title at issue in *Home Builders*. In *Home Builders*, the Court invalidated as a clear title violation legislation with a title "relating to property ownership," because the bill's divergent provisions, such as those dealing with a fund to market agricultural products, tax credits for research, and municipal commission fuel purchases, could be said to "relate to property ownership" only in the most tangential way that would hold true for nearly every piece of legislation. *Id.* at 270.

The Court has found the same flaw in legislation with titles such as "relating to certain incorporated and non-incorporated entities" and "relating to economic development." *See St. Louis Health Care Network v. State*, 968 S.W.2d 145, 148 (Mo. banc 1998); *Carmack*, 945 S.W.2d at 960. In these cases, the titles were problematic because the titles, like the title in *Home Builders*, could describe most, if not all, legislation passed by the General Assembly.

In cases where the title "does not describe most, if not all, legislation enacted" or "include nearly every activity the state undertakes," however, the Court has rejected clear-title challenges. *See, e.g., Missouri State Medical Ass'n*, 39 S.W.3d at 841 (no clear title violation in bill entitled "relating health services"); *Corvera Abatement Tech. v. Air Conservation Comm'n*, 973 S.W.2d 851, 861-62 (Mo. banc 1998) (no violation in bill entitled "relating to environmental control").

Here, H.B. 58's title "relating to political subdivisions" is not so amorphous as to constitute a clear-title violation. The title does not describe most, if not all, legislation

enacted by the General Assembly. And it does not include nearly every activity the State undertakes. So it adequately expresses the subject of H.B. 58 and passes muster under Article III, § 23.

D. Vagueness and overbreadth doctrines cannot invalidate § 67.2555.

The County also attacked § 67.2555 based on vagueness and overbreadth doctrines. But neither of these doctrines has any application to this case.

Both doctrines stem from the Due Process Clause. *Cocktail Fortune, Inc. v. Supervisor of Liquor Control*, 994 S.W.2d 955, 957 (Mo. banc 1999) (vagueness); *City of Chicago v. Morales*, 527 U.S. 41, 52-55 (1999) (overbreadth). And as a political subdivision, the County is not a "person" entitled to assert due process rights. *See City of Chesterfield v. Director of Revenue*, 811 S.W.2d 375, 377 (Mo. banc 1991) ("Both state and federal courts have repeatedly held that municipalities and other political subdivisions established by the state are not 'persons' within the protection of the due process and equal protection clauses...."); *Sweeten v. Watie*, 842 S.W.2d 190, 191 (Mo. App. E.D. 1992) (counties not entitled to due process).

Even if the County were a person within the meaning of the due process clause, neither doctrine could validate the trial court's judgment. The vagueness doctrine provides only modest restrictions on civil laws. "The test ... is whether the language conveys to a person of ordinary intelligence a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *Cocktail Fortune*, 994 S.W.2d

at 957. But "neither absolute certainty nor impossible standards of specificity are required." *Id.* And if a "law is susceptible to any reasonable and practical construction," courts must uphold it in the face of such attacks. *Id.*

In the trial court, the County's argument was not that § 67.2555 was too vague, but that it would apply to various contracts that the County did not want to bid out competitively. That is not the makings of a vagueness challenge. And, regardless, § 67.2555 uses words that are understandable to persons of ordinary intelligence and does not operate to deprive the County of any protected "life, liberty, or property" rights, as would a criminal or civil forfeiture statute – the usual targets of vagueness challenges.

Finally, the overbreadth doctrine "permits facial invalidations of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when 'judged in relation to the statute's plainly legitimate sweep.'" *City of Chicago v. Morales*, 527 U.S. at 52 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612-15 (1973)). Where a law does not have a "substantial impact on conduct protected by the First Amendment," the doctrine does not come into play. *Id.* at 52-53. Because § 67.2555 does not prohibit any speech or expressive conduct, the overbreadth doctrine provides no basis to set it aside, even if one assumes that the County could raise such a claim.

E. The General Assembly did not violate Article III, § 42's notice provisions.

The County's last theory of invalidity – based on Article III, § 42 – can be dealt with summarily. Article III, § 42 requires the General Assembly to publicize a notice before

passing a special law. Because § 67.2555 is not a special law, as the County claimed, Article III, § 42 was not violated.

Conclusion

For the foregoing reasons, the Court should REVERSE the circuit court's judgment that § 67.2555 is invalid and must be enjoined.

Respectfully submitted,

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

The undersigned hereby certifies that on this 3rd day of April, 2006, one true and correct copy of the foregoing brief, one disk containing the foregoing brief and separate appendix, were mailed, postage prepaid, to:

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The undersigned certifies that the foregoing brief complies with the limitation contained in Rule 84.06(b), and that the brief contains 9006 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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Heidi C. Doerhoff

APPENDIX

Index to the Appendix