SC91130

IN THE SUPREME COURT OF MISSOURI

MICHELLE SCHAEFER, et al.,

Plaintiffs - Appellants,

v.

CHRISTOPHER KOSTER,

Defendant - Respondent.

Appeal from the Circuit Court of Cole County, Missouri
The Honorable Paul C. Wilson, Judge

BRIEF OF RESPONDENT

CHRIS KOSTER
Attorney General

JEREMIAH J. MORGAN
Deputy Solicitor General
Missouri Bar No. 50387
P.O. Box 899
Jefferson City, MO 65102
(573) 751-1800
(573) 751-0774 (facsimile)
Jeremiah.Morgan@ago.mo.gov

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTORY AUTHORITY

STATEMENT OF FACTS

On July 3, 2008, House Bill 1715 (HB 1715) became effective and repealed and reenacted § 577.023, RSMo (2008 Cum. Supp.).[1/] (LF Vol. I, 80). Section 577.023 provides, in part, for enhanced penalties for "aggravated," "chronic," "persistent," and "prior" offenders, including intoxication-related traffic offenders. § 577.023.1-.16. The very next year, § 577.023 was again repealed and reenacted, with nearly identical provisions, by House Bill 62 (HB 62). (LF Vol. I, 80). The provisions of § 577.023, as repealed and reenacted by HB 62, became effective July 9, 2009. (LF Vol. I, 80).

Plaintiffs-Appellants Michelle Schaefer, Cindy Brandt, and Dale Price ("Plaintiffs"), have pled guilty, were found guilty, or were convicted of intoxication-related traffic offenses on multiple occasions. (LF Vol. I, 78). The Plaintiffs were arrested and charged most recently on the following dates:

Plaintiff	Date Arrested	Date Charged
Schaefer	October 2, 2008	January 9, 2009
Brandt	April 15, 2009	May 11, 2009
Price	April 21, 2009	September 11, 2009

1/ All references to the Revised Statutes of Missouri (RSMo) will be to the 2008 Cumulative Supplement unless otherwise specified.

(LF Vol. I, 79).

The criminal cases resulting from Plaintiffs' most recent arrests and charges are (or were) pending in St. Charles County (*State v. Schaefer*, Case No. 0911-CR00169-01 and *State v. Brandt*, Case No. 0911-CR02679), and Franklin County (*State v. Price*, Case No. 09AB-CR01870). *See* Appellants' Br., pp. 25-26. It is in these most recent criminal cases that "the State of Missouri may seek, has threatened to seek, or has already sought prior, persistent, aggravated, or chronic offender enhancement status under § 577.023." (LF Vol. I, 79). The parties also stipulated that in these same criminal cases "Plaintiffs have argued or could argue as a defense that House Bill 1715 and Section 577.023 RSMo, . . . are unconstitutional." (LF Vol. I, 79).

After their arrests or criminal charges were filed in separate counties, Plaintiffs filed a consolidated "Petition for Declaratory Judgment to Declare House Bill 1715 and 2008 Amendment to § 577.023 to be Unconstitutional and for Injunctive Relief Against the State of Missouri." (LF Vol. I, 10). The declaratory judgment petition was filed on May 15, 2009 in Cole County. (LF Vol. I, 1). Plaintiffs make no claim in their declaratory judgment petition that the current version of § 577.023 is unconstitutional, instead, they limit their claim to "only the 2008 amendment of Section 577.023.16, RSMo, as enacted by House Bill 1715." (LF Vol. I, 79). Section 577.023.16, which is the specific

provision at issue, does not provide for a sentencing enhancement, but instead provides for "[e]vidence of a prior plea of guilty or finding of guilty."

Following initial pleadings and informal discovery, the parties submitted an "Agreed Statement of Uncontroverted Material Facts" with accompanying cross-motions for summary judgment. (LF Vol. I, 6-7). The trial court entered its Final Judgment "dismissing Plaintiffs' Petition in its entirety and with prejudice." (LF Vol. II, 70). The trial court rejected the Plaintiffs' claims, "without expressing an opinion as to the constitutionality of HB 1715," because "Plaintiffs have not (and cannot) establish the 'personal stake in the outcome' necessary to make their constitutional claims litigable in this Court, and because these constitutional issues should be litigated (if at all) by each Plaintiff in each separate criminal case." (LF Vol. II, 71).

After the Final Judgment was entered by the trial court on June 29, 2010, and while the case was pending on appeal, two of the Plaintiffs pled guilty in their separate criminal cases and their criminal charges are no longer pending. *See* Appellants' Br., pp. 25-26. Only one of the Plaintiffs has a criminal charge still pending that could involve evidence under any version of § 577.023.16 – Cindy Brandt – and it is only pending because of an astonishing 13 continuances. *See* https://www.courts.mo.gov/casenet (Case No. 0911-CR02679).

SUMMARY OF THE ARGUMENT

This case demonstrates the inherent and necessary limitations of Missouri's Declaratory Judgment Act. Declaratory judgment was never "'intended to displace all existing remedies,'" much less claims or defenses that can and should be brought in existing criminal cases. *City of St. Louis v. Crowe*, 376 S.W.2d 185, 189 (Mo. 1964). But that is exactly what the Plaintiffs seek to do in this case – displace remedies in their criminal cases. And in their zeal to pursue declaratory judgment relief, Plaintiffs ignore the "threshold question" of mootness. *State ex rel. Reed v. Reardon*, 41 S.W.3d 470, 473 (Mo. banc 2001).

As a threshold question, mootness should be considered at the outset of any appeal. Here, two of the Plaintiffs – Michelle Schaefer and Dale Price – already pled guilty to their criminal charges after appealing this case. It is these criminal charges that form the basis of their constitutional claims. Therefore, there is no decision by this Court that could "have any practical effect upon any then existing controversy'" for these two Plaintiffs. *Id.* Furthermore, the claims of all Plaintiffs are moot because the very statute they challenge as unconstitutional is no longer in effect. The statutory provision at issue – § 577.023.16 – is a procedural statute, and has been repealed and reenacted.

Finally, the trial court is "afforded wide discretion in applying the Declaratory Judgment Act," and there is no abuse of discretion in dismissing a declaratory judgment petition when there is an alternative remedy available.

State ex rel. Small v. Harrah's North Kansas City Corp., 24 S.W.3d 60, 63 (Mo. App. W.D. 2000). Indeed, in addition to the existence of an alternative remedy, there are a number of good reasons supporting the trial court's discretionary decision to deny declaratory judgment.

ARGUMENT

Standard of Review

Appellate review of a summary judgment decision is typically *de novo*. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). The trial court, however, is "afforded wide discretion in applying the Declaratory Judgment Act." *State ex rel. Small v. Harrah's North Kansas City Corp.*, 24 S.W.3d 60, 63 (Mo. App. W.D. 2000) (citing *Raskas Foods, Inc. v. Southwest Whey, Inc.*, 978 S.W.2d 46, 48 (Mo. App. E.D. 1998)). And in this case, the only claims raised by the Plaintiffs are claims under the Declaratory Judgment Act. (LF Vol. I, 10-14).

"The trial court's exercise of discretion in applying the provisions of the Declaratory Judgment Act must be sound, based on good reason, and calculated to serve the purposes for which the legislation was enacted." *Preferred Physicians Mut. Management Group, Inc. v. Preferred Physicians Mut. Risk Retention Group*, 916 S.W.2d 821, 824-25 (Mo. App. W.D. 1995). When there is an adequate alternative remedy available, the trial court does not abuse its discretion in dismissing a declaratory judgment petition. *State ex rel. Small*, 24 S.W.3d at 67.

The trial court in this case properly exercised its wide discretion, holding that a declaratory judgment was inappropriate for a variety of reasons, not the least of which was the availability of adequate alternative remedies. (LF Vol. II,

71 (holding that the "constitutional issues should be litigated (if at all) by each Plaintiff in each separate criminal case")). But even before reaching the trial court's discretionary decision, the claims should be dismissed as moot. Accordingly, the trial court's dismissal of the Plaintiffs' declaratory judgment petition should be affirmed.

I. The Plaintiffs' Claims are Moot Because Declaratory Judgment Would Have No Practical Effect on Any Existing Controversy. – Responding to Appellants' Point I.

"'A threshold question in any appellate review of a controversy is the mootness of the controversy.'" *State ex rel. Reed v. Reardon*, 41 S.W.3d 470, 473 (Mo. banc 2001) (quoting *Armstrong v. Elmore,* 990 S.W.2d 62, 64 (Mo. App. W.D. 1999) ("The existence of an actual and vital controversy susceptible of some relief is essential to appellate jurisdiction."). Mootness "implicates the justiciability of a case," and, therefore, an appellate court can "dismiss a case for mootness *sua sponte*." *State ex rel. Reed*, 41 S.W.3d at 473. As such, before addressing any other deficiencies, this Court should consider whether the Plaintiffs claims are entirely moot because this case – as the trial court properly held – "will not (and cannot) have any effect." (LF Vol. II, 76; Resp't Appdx. A7).

A claim 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.'" *State ex rel.*

Reed, 41 S.W.3d at 473 (quoting *Bank of Washington v. McAuliffe,* 676 S.W.2d 483, 487 (Mo. banc 1984)). Even a case vital at inception may be mooted by an intervening event that "so alters the position of the parties that any judgment rendered merely becomes a hypothetical opinion." *State ex rel. Reed*, 41 S.W.3d at 473.

Plaintiffs acknowledge in their opening brief that significant and relevant changes have transpired since the case was appealed. *See* Appellants' Br. 24-26. Indeed, there have been two intervening events rendering the case moot; Plaintiffs Schaefer and Price pled guilty in their criminal cases, and § 577.023.16 was repealed and reenacted. When "an event occurs that makes a court's decision unnecessary or makes granting effectual relief by the court impossible, the case is moot and generally should be dismissed." *State ex rel. Reed*, 41 S.W.3d at 473.

A. The Claims of Plaintiffs Schaefer and Price are Moot Because They Already Pled Guilty and Have No Existing Controversy.

For purposes of summary judgment, the parties stipulated that "[in] each of the most recent criminal prosecutions against Plaintiffs . . . the State of Missouri may seek, has threatened to seek, or has already sought prior, persistent, aggravated, or chronic offender enhancement status under § 577.023." (LF Vol. I, 79). The parties also stipulated that in the criminal cases "Plaintiffs have argued or could argue as a defense that House Bill 1715 and

§ 577.023 . . . are unconstitutional," but the respective trial courts in the criminal cases "have not ruled upon the issue." (LF Vol. I, 79). The facts, however, have now changed and render the claims of Plaintiffs Schaefer and Price entirely moot.

Plaintiffs concede in their opening brief that the relevant circumstances of Plaintiffs Schaefer and Price have changed since the appeal was filed. *See* Appellants' Br., pp. 24-26 ("Appellant Schaefer pleaded guilty . . . [and] In Price's case, mysteriously, the local prosecutor never attempted to enhance the charge . . . ."). They no longer have pending criminal charges – charges that were the very basis for their declaratory judgment petition. (LF Vol. I, 11 ("All Plaintiffs have criminal prosecutions pending . . . .")).

"In deciding whether a case is moot, an appellate court is allowed to consider matters outside the record." *State ex rel. Reed*, 41 S.W.3d at 473 (citing *Bratton v. Mitchell,* 979 S.W.2d 232, 236 (Mo. App. W.D. 1998) and *State ex rel. Wilson v. Murray,* 955 S.W.2d 811, 812 (Mo. App. W.D. 1997)). Here, Case.net shows (and Plaintiffs confirm) that there is no longer any criminal cases involving Plaintiffs Schaefer and Price. *See* https://www.courts.mo.gov/casenet (listing cases as disposed). As such, their claims for declaratory judgment are moot because even if the requested judgment was rendered in this case, it "would not have any practical effect upon any then existing controversy" involving Plaintiffs Schaefer and Price. *State ex rel. Reed*, 41 S.W.3d at 473.

B. All of the Plaintiffs' Claims Are Moot Because the Provisions of HB 1715 Will Never Be Enforced Against Them.

Not only are the claims of Plaintiffs Schaefer and Price moot because they already pled guilty and have no pending criminal cases, but all of the Plaintiffs' declaratory judgment claims are moot. This is because the law Plaintiffs challenge for a violation of the "change of purpose," "single subject," and "clear title" provisions of the Missouri Constitution, was repealed and reenacted with nearly identical provisions one year later. Plaintiffs do not challenge the provisions of the reenacted law – § 577.023.16 – which are procedural and will, therefore, be used in Plaintiffs' criminal cases. Thus, the repeal and reenactment of the law renders it impossible to grant the relief Plaintiffs request.

The parties stipulated that "Plaintiffs challenge only the 2008 amendment of Section 577.023.16, RSMo, as enacted by House Bill 1715." (LF Vol. 1, 79). The provisions of § 577.023.16, as enacted by HB 1715 in 2008, are no longer in existence and were not (after 2009) and will never be applied to the Plaintiffs. Declaring the challenged 2008 law void and unconstitutional or enjoining the State of Missouri from enforcing or using the 2008 law against Plaintiffs is impossible because that law will never be applied to Plaintiffs. Instead, it will be the current version of the law that is enforced against Plaintiffs, if at all.

Whether a challenged law is procedural or substantive will determine whether a court reviews the law as it existed when a defendant committed the offense or as it is exists at the defendant's trial. *See, e.g., Wilkes v. Missouri Highway and Transp. Comm'n*, 762 S.W.2d 27, 28 (Mo. banc 1988). The *ex post facto* doctrine requires courts to apply a substantive law as it existed when the defendant committed the offense; however, courts apply a procedural law as it exists at trial. *See State v. Casaretto*, 818 S.W.2d 313, 316 (Mo. App. E.D. 1991). In this case, Plaintiffs have challenged an outdated procedural law – § 577.023.16 – which provides for evidence of a prior plea of guilt or finding of guilt. (LF Vol. I, 12). And the trial court did not have before it the current version of § 577.023.16, which would be applied in Plaintiffs' pending trials. As such, all of the Plaintiffs' claims are moot.

An *ex post facto* violation requires a showing that a substantive criminal law was applied retrospectively and disadvantaged the defendant. *State v. Zoellner*, 920 S.W.2d 132, 135 (Mo. App. E.D. 1996). A law is substantive and disadvantages a defendant for purposes of an *ex post facto* violation if it (1) declares an act to be criminal which was not criminal when committed, (2) aggravates a crime or makes it greater than it was, (3) increases the punishment for a crime, or (4) alters the rules of evidence to allow less or different testimony. *Id.* Importantly, this Court noted that "mere disadvantage to an offender is not the standard for judging the *ex post facto* effect of the law."

Storey v. State, 175 S.W.3d 116, 131 (Mo. banc 2005). No *ex post facto* violation occurs if "the change in the law is merely procedural." *Id.*

Sentence-enhancing statutes, like the one Plaintiffs challenge in this case, generally withstand *ex post facto* challenges. *Zoellner*, 920 S.W.2d at 135. That is because "such statutes do not punish a defendant for his prior convictions; rather, they punish him as a repeat offender for his latest offense on the basis of a demonstrated propensity for misconduct." *Id. Zoellner* specifically found that the use of prior convictions to enhance a sentence under § 577.023 is procedural because it did not disadvantage the defendant in any of the four ways specified, and, therefore, "did not constitute an *ex post facto* violation." *Id.* Because § 577.023.16 is a procedural criminal law, it must be applied as it exists at the time of trial. *Id.*; *Storey*, 175 S.W.3d at 131.

In a factually analogous case, *Storey v. State*, the petitioner claimed his trial counsel had been ineffective by not objecting to victim impact evidence as an *ex post facto* violation. *Id.* Victim impact evidence was not admissible at the time petitioner committed the offense. *Id.* After commission of the offense, but before the issue of victim impact evidence admissibility arose in the trial court, the Missouri legislature made victim impact evidence admissible. *Id.* at 132. The court found the "change in the law [was] merely procedural" because "there was no change in the requirements, burden of proof, or penalty for [the offense] by allowing victim impact evidence." *Id.* The "mere disadvantage of having

more evidence admitted in his third trial is insufficient to show an *ex post facto* violation." *Id.* Thus, applying the law as it existed at the time of trial–not as it existed at the time of the offense–was proper. *Id.*

Like the unsuccessful petitioner in *Storey v. State*, Plaintiffs attempt to treat § 577.023.16, a provision concerning the use of evidence, as a substantive criminal law because they would have this Court review that law as it existed at the time Plaintiffs committed their offenses. *See* Appellants' Br., p. 33 (arguing that Plaintiffs' sentencing "falls under the HB 1715 version of RSMo. § 577.023 that became law on July 4, 2008). The Missouri legislature, however, repealed and reenacted § 577.023.16 after Plaintiffs committed their offenses but before application of that law in any of the Plaintiffs' pending criminal cases.

The courts in Plaintiffs' pending criminal cases will, if at all, apply the current version of § 577.023.16, not the older 2008 version Plaintiffs challenge in this case. For these reasons, granting Plaintiffs' requested relief would have no practical effect, and, therefore, all of the Plaintiffs' claims are moot.

II. The Trial Court Did Not Abuse its Wide Discretion in Denying Declaratory Judgment For Several Good Reasons. – Responding to Appellants' Point I.

Even if the Plaintiffs' declaratory judgment claims are not moot, they still fail and were appropriately dismissed in accordance with the trial court's "wide discretion in applying the Declaratory Judgment Act." *State ex rel. Small*, 24 S.W.3d at 63 (citing *Raskas Foods*, 978 S.W.2d at 48). Indeed, when there is an adequate remedy already available, as in this case, the trial court does not abuse its discretion in dismissing declaratory judgment claims.[2/] *See id.* at 67.

Here, there were, and are, perfectly adequate alternatives to advance the Plaintiffs' declaratory judgment claims; namely, in their pending criminal cases.

[2/] This is consistent with one of the purposes of the Declaratory Judgment Act – to reduce litigation. *Raskas Foods*, 978 S.W.2d at 48. Yet, Plaintiffs argue that permitting a separate declaratory judgment action in this case (*i.e.* four total cases instead of three), would in fact reduce litigation. Not so. Permitting two suits with the same purpose would run contrary to the purpose of the Act. *See State ex rel. Small*, 24 S.W.3d at 66. And it is not as though the criminal cases can be avoided. As the trial court aptly stated, "Plaintiffs' present criminal charges will not be *dismissed* if HB 1715 is declared unconstitutional." (LF Vol. II, 76 (emphasis in original)).

Furthermore, the trial court appropriately exercised its discretion in denying declaratory judgment for a multitude of other good reasons.

A. A Remedy Already Exists in the Plaintiffs' Criminal Cases for Their Declaratory Judgment Claims.

It is well settled that relief by declaratory judgment was never "'intended to displace all existing remedies.'" *City of St. Louis v. Crowe*, 376 S.W.2d 185, 189 (Mo. 1964) (quoting *State ex rel. United States Fire Ins. Co. v. Terte*, 176 S.W.2d 25, 28 (Mo. banc 1943) (finding that "[t]he doctrine is settled"). The declaratory judgment power "is not to be invoked where an adequate remedy already exists." *Preferred Physicians*, 916 S.W.2d at 824; *see Cronin v. State Farm Fire & Cas. Co.*, 958 S.W.2d 583, 587-88 (Mo. App. W.D. 1997) (stating that except in unusual circumstances plainly appearing, a declaratory judgment action cannot be maintained if an adequate remedy exists, regardless of whether the adequate remedy is legal or equitable).

"For the purpose of this rule, an adequate remedy exists if the plaintiff could assert the issues sought to be declared as a defense in an action brought by the defendant." *Preferred Physicians*, 916 S.W.2d at 824. In *Preferred Physicians*, the party had available an adequate alternative remedy in the form of an affirmative defense in the pending lawsuit. Additionally, the court noted that in situations where the alternative remedy is a pending suit, as opposed to a more uncertain remedy, there is even greater justification to apply the rule

against allowing actions for declaratory judgment. *Id.* (citing *Terte*, 176 S.W.2d at 30). Thus, when "an adequate remedy already exists, that declaratory judgment claim fails to state a cause of action." *Id.* at 825 (citing *Harris v. State Bank & Trust Co. of Wellston*, 484 S.W.2d 177, 178-79 (Mo. 1972)).

Similarly, in *State ex rel. Small v. Harrah's North Kansas City Corp.*, Small had an adequate alternative remedy because there was a pending federal action. 24 S.W.3d at 65. Citing *Preferred Physicians*, the court found that merely because Small's pending remedy was available within a different court system does not change the result. *Id.* "The fact remains that Small had a forum in which to present his argument . . . ." *State ex rel. Small*, 24 S.W.3d at 65.

Declaratory judgment is also not available if the issues can be "preserved and raised during the judicial review portion of the administrative proceeding." *Farm Bureau Town and Country Ins. Co. of Mo. v. Angoff*, 909 S.W.2d 348, 353 (Mo. banc 1995) (adopting the principles established in *Younger v. Harris*, 401 U.S. 37 (1971), which held that a federal court should not enjoin pending state criminal proceedings); *see also Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 627 (1986) (preventing a federal court from granting an injunction prohibiting state administrative proceedings as long as in the course of the proceedings the plaintiff had a full and fair opportunity to litigate the constitutional claims).

In this case, each of the Plaintiffs have, or had, a perfectly adequate opportunity to raise their constitutional claims in their pending criminal cases. They even stipulated that in their criminal cases they "have argued or could argue as a defense that House Bill 1715 and Section 577.023 RSMo., under which the State of Missouri has charged them as a prior, persistent, aggravated or chronic offender, is unconstitutional." (LF Vol. I, 79). As such, declaratory judgment is not an available remedy and the trial court properly dismissed the Plaintiffs' claims.

B. The Trial Court Properly Exercised Its Discretion in Dismissing Plaintiffs' Declaratory Judgment Claims for Several More Good Reasons.

In addition to the availability of alternative remedies, there are several more good reasons supporting the trial court's discretionary decision to dismiss the Plaintiffs' declaratory judgment action. This decision by the trial court is "afforded wide discretion." *State ex rel. Small*, 24 S.W.3d at 63. And the reasons in this case are "sound, based on good reason, and calculated to serve the purposes for which the legislation was enacted." *Preferred Physicians*, 916 S.W.2d at 824-25. The following are just a sampling of the good reasons for the trial court's proper exercise of discretion.

First, until the local prosecutor files a criminal charge there will always remain uncertainty as to what the prosecutor will or will not charge. *See State*

v. Honeycutt, 96 S.W.3d 85, 89 (Mo. banc 2003) (holding that "a prosecutor has broad discretion to determine when, if, and how criminal laws are to be enforced"). A party may anticipate a certain criminal charge or enhancement (or use of evidence of a prior guilty plea), but the prosecutor may never bring that charge or may drop it in the end. This case is a perfect example of this very point.

Plaintiff Price anticipated that an enhancement would be sought in his criminal case under § 577.023, and he pled as much in this case. (LF Vol. I, 11) (alleging that "the State of Missouri has sought or threatened to seek prior, persistent, aggregated or chronic offender enhancement status"). But it never materialized. According to the Plaintiffs, "[i]n Price's case, mysteriously, the local prosecutor never attempted to enhance the charge." Appellants' Br. p. 26. The trial court easily recognized this problem, finding that "Plaintiffs have no way of knowing whether the prosecutors will seek to enhance Plaintiffs' charges under Section 577.023 *when these three cases get to trial*, which is the only time that a prosecutor must take an irrevocable and unalterable position on the issue." (LF Vol. II, 77 (emphasis in original)). This was a good reason to exercise discretion and dismiss the case.

Second, it would be inappropriate for a trial court to interject itself in the substance of a case in which another trial court is already litigating. This basic concept has been recognized in a variety of different settings with a number of

resulting abstention doctrines and related principles. Although possibly inartfully expressed as the "abatement doctrine" in the trial court, it is this same basic concept that should limit this case as well.[3/] Once again, the trial court correctly recognized this limiting principle, finding that "Plaintiffs are litigating before a Judge who otherwise would play no role in Plaintiffs' criminal cases." (LF Vol. II, 72). This was another good reason to exercise discretion and dismiss the case.

Third, there is no way to know if the declaratory judgment sought will actually benefit the Plaintiffs. This case provides another good demonstration of this point. Plaintiffs Schaefer and Price have already pled guilty to their criminal charges, and, therefore, even if the trial court did find HB 1715 unconstitutional it would provide no benefit or relief to these Plaintiffs. The trial court recognized this good reason, finding that there is nothing to support

---

[3/] The doctrine of abatement applies when two judicial proceedings before courts of concurrent jurisdiction involve the same parties and subject matter. *See Meyer v. Meyer*, 21 S.W.3d 886, 889-90 (Mo. App. E.D. 2000). Where the object and purpose of two proceedings is the same, abatement is proper. *Id.* at 890. The principles behind abatement are (1) judicial economy–to use one proceeding to adjudicate related claims and (2) fairness to the parties–to not have to appear in multiple courts to litigate related claims.

that "Plaintiffs (or any of them) actually *will benefit* in their criminal cases from a declaration that HB 1517 is unconstitutional." (LF Vol. II, 72-73 (emphasis in original)).

These are just some of the reasons supporting the trial court's appropriate exercise of discretion in dismissing this declaratory judgment action. But they are enough, as well as the adequate alternative remedies, to affirm the trial court's decision.

III. The Plaintiffs' Constitutional Claims Were Never Decided by the Trial Court and Should Not be Decided in This Court. – Responding to Appellants' Point II.

Finally, Plaintiffs spend many pages in their brief explaining why they should prevail on the substance of their constitutional claims. The trial court, however, rejected "Plaintiffs' claims, without expressing an opinion as to the constitutionality of HB 1715." (LF Vol. II, 71). Because of the numerous deficiencies in the Plaintiffs' declaratory judgment petition, and the trial court's appropriate exercise of discretion, these claims were never reached. Under these circumstances, the constitutional issues "should not be addressed." *Farm Bureau*, 909 S.W.2d at 355.

CONCLUSION

For the foregoing reasons, this Court should affirm the trial court.

Respectfully submitted,

CHRIS KOSTER
Attorney General

By:_____
JEREMIAH J. MORGAN
Deputy Solicitor General
Missouri Bar No. 50387
P.O. Box 899
Jefferson City, MO 65102
(573) 751-1800
(573) 751-0774 (facsimile)
Jeremiah.Morgan@ago.mo.gov

ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the foregoing brief, and an electronic disk with the brief were mailed, postage prepaid, via United States mail, on February 9, 2011, to:

Carl M. Ward
Jeremy D. Hollingshead
Ward | Hollingshead
216 West Main Street
Washington, Missouri 63090

and

Jeffrey S. Eastman
Kelleher & Eastman
403 NW Englewood Road
Gladstone, Missouri 64118-3969

ATTORNEYS FOR APPELLANTS

_____
Jeremiah J. Morgan
Deputy Solicitor General

CERTIFICATION OF COMPLIANCE

The undersigned hereby certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 4,976 words.

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

_____

Jeremiah J. Morgan
Deputy Solicitor General

RESPONDENT'S APPENDIX

Index