SC97653

IN THE SUPREME COURT OF MISSOURI

CITY OF CRESTWOOD, et al.,

Appellants,

v.

AFFTON FIRE PROTECTION DISTRICT, et al.,

Respondents.

Appeal from the Circuit Court of Cole County, Missouri
The Honorable Jon E. Beetem, Circuit Judge

RESPONDENTS' BRIEF

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STATEMENT OF FACTS

The City of Crestwood (the "City") and two City residents, Gregg Roby and Stefani Hoeing (D2, p. 2), filed an amended petition challenging the constitutional validity of Sections 72.418.2 and 321.322.3, RSMo. D2, p. 1. Both statutes address fire protection services following annexation by cities. Sections 72.418.2, 321.322, RSMo.

St. Louis County is "a first class county with a charter form of government[.]" D2, p. 4 (¶18). In 1997, the City annexed an unincorporated area of St. Louis County served by the Affton Fire Protection District (the "District"). D2, pp. 3, 4 (¶¶6, 14, 20). The District has continued to provide fire protection service to the Annexed Area following the 1997 annexation. D2, p. 5 (¶25). The District does not levy a tax on the Annexed Area "for bonded indebtedness by the District" which existed prior to the 1997 annexation. D2, p. 6 (¶28); D6, p. 4 (¶28). The residents of the City of Crestwood—whether they live in the Annexed Area or elsewhere in the City—pay no taxes to the Affton Fire Protection District. D2, p. 4, ¶17, p. 5, ¶¶24, 25; see D2, p. 4, ¶¶21, 22.

Plaintiffs Roby and Hoeing do not reside within the area served by the District that the City annexed in 1997 (the "Annexed Area"). D2, p. 4 (¶¶21, 22). Roby and Hoeing pay property tax to the City. D2, p. 4 (¶¶21, 22). They do not pay taxes to the District. D2, p. 4, ¶¶17, 21, 22.

The City has been making the annual payment required by §72.418 to the District from the City's "general funds." D2, p. 1 (¶1). Plaintiffs did not allege or present any evidence that the City increased its property tax levy, or the rate of any other tax, after the 1997 annexation of the Annexed Area. The First Amended Petition does not allege, nor does it contain allegations from which an inference could reasonably be drawn, that Roby and Hoeing "bear a

per capita share of the annual payment that Crestwood is required to pay to the District." See Apps' Br. at 12. The First Amended Petition alleges that increases in the District's property tax levy rate approved by the voters within the territorial limits of the District in 2012 and 2017 (D2, pp. 8-9, ¶¶44-48) "increased the amount Crestwood is required to annually pay to the District pursuant to § 72.418.2, RSMo." D2, pp. 9-10 (¶51).

Currently, St. Louis County is the only Missouri county "in which the governing body has established a boundary commission." D2, p. 7 (¶32). But Missouri has 114 counties, 18 of which are first class counties. D2, p. 7 (¶¶33, 36). Four Missouri counties, St. Louis County, Jackson County, St. Charles County, and Jefferson County, have adopted charters. D2, p. 4 (¶18), p. 7 (¶33). Section 72.401.1 states that

> If a [boundary] commission has been established under sections 72.400 to 72.423 in any county with a charter form of government where fifty or more cities, towns and villages have been established, any boundary change within the county shall proceed solely and exclusively in the manner provided for by sections 72.400 to 72.423, notwithstanding any statutory provisions to the contrary concerning such boundary changes.

Section 72.401.1 RSMo. Subsection two states that

> In any county with a charter form of government where fifty or more cities, towns and villages have been established, if the governing body of such county has by ordinance established a boundary commission, as provided in sections 72.400 to 72.423, then boundary changes in such county shall proceed only as provided in sections 72.400 to 72.423.

Section 72.401.2 RSMo. Plaintiffs alleged that there are "approximately 90 cities, towns, and villages in St. Louis County… ." D2, p. 8 (¶41).

In Counts I and II of the First Amended Petition, Plaintiffs alleged that Sections 72.418.2 and 321.322.3 were unconstitutional special laws. D2, pp. 17-18 (Count I) (§72.418.2), p. 19 (Count II) (§321.322.3). Count III alleged that a

payment that the City is required to make to the Affton Fire Protection District under §72.418.2 "results in a tax rate" that exceeds the rate ceiling in art. X, sec. 11(b) of the Missouri Constitution. D2, p. 20. Count IV alleged that Roby and Hoeing were "taxed by the District without representation" (D2, p. 21 (¶112)) and "that §72.418.2, RSMo. violates the due process clauses of the Missouri and U.S. Constitutions… " (D2, p. 21 (¶110)).

The First Amended Petition alleged that more than sixty percent of the voters within the territorial limits of the District approved property tax levy increases for the support of the District in 2012 and 2017. D2, pp. 8-9 (¶¶44-48). Voters in the Annexed Area of Crestwood, who continued to be served by the fire protection district (D2, p. 5 (¶25)), took part in those elections. D2, p. 8, ¶¶48, 50. In Count V, Roby and Hoeing, who do not reside within the Annexed Area of the City (D2, p. 4, (¶¶21, 22)), alleged that the District's 2012 and 2017 property tax increases violated art. X, sec. 22 because Roby and Hoeing were not allowed to vote on the District's 2012 and 2017 propositions that increased the District's property tax rate. D2, pp. 22-23 (see ¶¶ 119, 120). In Count VI, Plaintiffs alleged that §72.418 "creates an unconstitutional unfunded mandate for Crestwood and its taxpayers[ ]" (D2, p. 24 (¶131)) in violation of art. X, secs 16 and 21 of the Missouri Constitution. D2, p. 24.

Defendants filed a motion for judgment on the pleadings. D26. Plaintiffs filed a motion for summary judgment. D8 through D10; D12 through D25 (Plaintiffs' Summary Judgment Exhibits). Defendants' response to Plaintiffs' motion for summary judgment (see D27 through D29) included an affidavit and expert report from Dr. T.R. Carr (D28). Dr. Carr explained that, "No other Missouri county faces, on an ongoing basis, the challenges presented by municipal annexation to the extent that St. Louis County does." D27, p. 32 (¶3); D28, p. 4. Eliminating the requirement that annexing municipalities pay

amounts equal to the fire districts' tax levies would "erode the tax base and the financial viability of the impacted fire districts." D28, p. 33; see D27, p. 33 (¶6). That would threaten "the financial viability of the effective and efficient delivery of EMS and fire service through a system that is unique to St. Louis County." D27, p. 33 (¶6); D28, pp. 4, 5, 23, 33. "Permitting the continued removal of parcels from fire protection districts in St. Louis County would threaten the viability of such districts—a threat that does not appear to exist to the same degree in any other Missouri county." D27, p. 32 (¶5); see D28, pp. 4, 32, 33. In reply, Plaintiffs did not present evidence that fire protection districts elsewhere face similar threats. D34, pp. 2-3. The pages of Dr. Carr's report referenced in Plaintiffs' response to Defendants' Statement of Additional Facts, ¶¶4 and 5, consist of tables of populations and assessed valuations. See D28, pp. 7-9, 18.

On December 12, 2018, the trial court granted Defendants' motion for judgment on the pleadings and denied Plaintiffs' motion for summary judgment. D38, p. 10; Apps' App. A12. Plaintiffs appealed. D39.

ARGUMENT

I. Section 72.418.2 should be upheld as a constitutionally valid statute. (Responds to Point I)

A. The test for determining whether § 72.418.2 is a "special law" is the pre-*Jefferson County* test: whether the criteria for its application are "open-ended" rather than "immutable."

In Article III, § 40, the Missouri Constitution bars the general assembly from passing "any local or special law" that falls within a long series of categories (followed by an exception, in subsection 40, for laws for which there is "substantial justification" *see City of Normandy v. Greitens*, 518 S.W.3d 183 (Mo. banc 2017)).

Before addressing Plaintiffs' argument that § 72.418.2 is invalid as a "special law" that was not properly enacted as such, we turn to the standards—past, present, and future—for determining whether a particular enactment is a "special law."

In *Jefferson County Fire Protection Districts,* this Court set out a new "special law" test. *Jefferson County Fire Protection Districts Ass'n v. Blunt*, 205 S.W.3d 866, 870-71 (Mo. banc 2006). But the Court also said the new test would only be applied to "statutes passed after the date of this opinion." *Id.* at 871.

A decade later, the Court cited that precedent and took the same approach to a further change from prior practice, which had allowed the use of a population minimum, with no cap:

> *Jefferson County* applied its holding prospectively, as it was the first case to articulate that a narrow population range in a statute could be considered a special law. While this is the first case to modify the *Jefferson County* analysis to apply to statutes setting a population minimum or maximum rather than a narrow

> population range, it is a logical extension of the reasoning in *Jefferson County*. The analysis in this opinion shall also apply prospectively to statutes passed after the date of this opinion because of the General Assembly's possible reliance on previous cases not addressing challenges to statutes with a population minimum or maximum.

City of Normandy v. Greitens, 518 S.W.3d 183, 195-96 (Mo. banc 2017).

It is firmly established, then, that the more restrictive *Jefferson County* test will not apply to bills enacted by the General Assembly in "possible reliance" on this Court's articulation of the "special law" standards that this Court applied at the time of enactment. So the question whether the General Assembly violated the constitution by enacting § 72.418.2 as a "special law" is answered using the test applied before *Jefferson County* was decided.

The most recent articulation by this Court of the test prior to *Jefferson County* was in *City of Springfield v. Sprint Spectrum, L.P.*, 203 S.W.3d 177 (Mo. banc 2006):

> When dealing with laws regarding taxation or powers of political subdivisions, this Court has recognized that whether a law is special or general can most easily be determined by looking to whether the categories created under the law are open-ended or fixed, based on some immutable characteristic. … A law is general or "open-ended" if "the status of a political subdivision under [the] classification could change." … "Legislation that is not open-ended typically singles out one or a few political subdivisions by permanent characteristics." … And, "[c]lassifications based on historical facts, geography, or constitutional status focus on immutable characteristics and are therefore facially special laws." …

203 S.W.3d at 184 (citations omitted). The Court looked not at whether the classification is likely to cover additional political subdivisions, but at whether it ever could. That meant that the General Assembly could target an area of greatest need, without being required to impose a new regime statewide until

it had been tested. *See State ex rel. Fire Dist. of Lemay v. Smith*, 184 S.W.2d 593, 596 (Mo. banc 1945) ("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."). And that the legislature could specify a particular criterion that covers one county or municipality today even if its use by other political subdivisions was, at that time, "not likely" absent extraordinary circumstances. *E.g., Bopp v. Spainhower*, 519 S.W.2d 281, 285 (Mo. banc 1975) (it was "not likely, that said population could have been reduced to less than 400,000. This could have occurred by reason of war or an extensive fire or an epidemic of serious proportions or other unforeseen disaster."). The shift away from accepting a criterion as "open-ended" even when it is "not likely" that some other political subdivision will qualify to looking at whether future qualification is "likely"—the shift from "unforeseen" to "foreseeable"—came only in and after *Jefferson County*–too late for the legislators who had already enacted various bills using what this Court on multiple occasions said were permissible criteria.

Here, Plaintiffs ask the Court to limit its prospective-only rule to criteria based on population. But Plaintiffs provide no rationale for that limitation. And it is entirely inconsistent with the Court's rationale. "[T]he General Assembly's possible reliance on previous cases" is not limited to cases addressing population ranges or minimums. Rather, not long before *Jefferson County*, the Court affirmed that "statutes [that] identify the counties by factors that change such as by reference to county classification, population, charter status and nonattainment criteria" were general, not special laws. *Treadway v. State*, 988 S.W.2d 508, 510 (Mo. banc 1999). In doing so, the Court included a long list of cases affirming various formulations of statutes that limited their effectiveness to "the metropolitan area of St. Louis. *Id.* at 511. After *Jefferson*

County, the Court continued along that line, affirming St. Louis-area-only statutes in *Board Educ. St. Louis v. Missouri Bd. Educ.*, 271 S.W.3d 1 (Mo. banc 2008) and *City of St. Louis v. State*, 382 S.W.3d 905 (Mo. banc 2012).

Consistent with its declarations in *Jefferson County* and *Greitens*, then, the Court should refuse in 2019 to hold the legislatures of the 1990s to a standard that is quite different from the one the Court at that time told the legislature to meet.

* * *

As discussed in (B) below, the discussion of the "special law" standard should be irrelevant to § 72.418.2: there is a "feasible" construction of that subsection that is not limited to St. Louis County, and if given that construction it is clearly not a "special law." Otherwise, as discussed in (C), § 72.418.2 is not a "special law" because under the pre-*Jefferson County* test it is a general law: it is not restricted based on any permanent, immutable characteristic. If § 72.418.2 were a "special law," as discussed in (D) the circuit court should be required to consider a factual record that would show whether it is "substantially justified." And as discussed in (E), Plaintiffs waived their claim that such review is now barred because the General Assembly allegedly did not comply with the procedural requirements of Art. III, § 42—a claim that is untimely, decades after the law was passed.

B. Because § 72.418.2 read as actually written and passed applies to the state as a whole, it is not a "special law."

As enacted by the General Assembly, § 72.418.2 does not include any limitation. The words passed by the General Assembly apply, on their face, "to the state as a whole" rather than to "localities" (*Jefferson County*, 205 S.W.3d

at 868).[1] Subsection § 72.418.2 applies to all "fire protection districts serving the area included within any annexation by a city having a fire department, including [but not limited to] simplified boundary changes." It states no exceptions.

That presents an important contrast to subsection 1—the preexisting § 72.418—which applies only to a "new city created pursuant to sections 72.400 to 72.423," *i.e.*, to cities created through the boundary commission process rather than through the more traditional incorporation statutes. That contrast shows that subsection 2 has broader application than just annexations "pursuant to sections 72.400 to 72.423." When the General Assembly chose to add subsection 2, it omitted the key restriction in the existing section. Unless some limitation is read into § 72.418.2 from another statute, the section does not implicate the "special law" provision at all.

The actual language of subsection 2 makes an expansive construction of that subsection at the very least a feasible construction. If adopting Plaintiffs' alternative, narrow construction raises a constitutional concern, this Court's longstanding rule requires it to reject that construction. *E.g.*, *State v. Vaughn*, 366 S.W.3d 513, 517 (Mo. banc 2012), quoting *State v. Stokely*, 842 S.W.2d 77, 79 (Mo. banc 1992) ("[I]f it is at all feasible to do so, statutes must be interpreted to be consistent with the constitutions."), and *Murrell v. State*, 215 S.W.3d 96, 102 (Mo. banc 2007) ("If a statutory provision can be interpreted in

[1] It is the actual passage of the bill that matters, under the Constitution. The bar is not on having "special laws"; it is on enacting them. Art. III, § 40 ("The general assembly shall not pass any local or special law" in the following categories). If a law is passed that is not "special" when enacted, but becomes "special" because of some later enactment, it is the later enactment that is constitutionally infirm, and declaring that invalid would return the law to its prior state.

two ways, one constitutional and the other not constitutional, the constitutional construction shall be adopted.")

That the subsection was placed in the boundary commission subchapter does not mean that the broader construction is not "feasible." Section 72.401.1, an admittedly key provision of the subchapter, does say, "If a boundary commission has been established under sections 72.400 to 72.423 in any county with a charter form of government where fifty or more cities, towns and villages have been established, any boundary change within the county shall proceed solely and exclusively in the manner provided for by sections 72.400 to 72.423, notwithstanding any statutory provisions to the contrary concerning such boundary changes." But literally read, neither that section nor any other part of the subchapter limits the establishment of boundary commissions to such counties. In fact, this section implicitly suggests that a boundary commission could be established in some other county—because "if," and only "if," the commission is in a county meeting the listed criteria, rather than a county that does not meet those criteria, the annexation and incorporation provisions in the subchapter preempt those found elsewhere. By negative inference, the statute says this as well: "if" there is a boundary commission in a county that does not meet the criteria, in that county the other, generally applicable statutes remain in force. That reading resolves the alleged conflict that Plaintiffs find between this subchapter and those statutes. Apps. Br. at 36-38.

The Court should reject Plaintiffs' demand that the Court find express statutory authority for such commissions in other counties. It is enough that charter counties may create commissions, including a boundary commission—without having to say that by creating such a commission a county has preempted otherwise applicable general law. The authority granted to charter

counties by Art. VI, sections 18(a), 18(b), and 18(c), is enough to permit the creation of such commissions, just as it is enough to permits counties to assume a wide range of other responsibilities (*see*, *e.g.*, *State ex rel. Shepley v. Gamble*, 280 S.W.2d 656 (Mo. banc 1955)) and to choose to structure themselves as they wish.

That authority is especially broad when touching upon the police power. *See*, *e.g.*, *Borron v. Farrenkopf*, 5 S.W.3d 618, 620 (Mo. App. W.D. 1999). Functions such as reviewing proposed municipal boundary changes and incorporations are both "fairly implied in or incident to those powers granted" to counties by the Constitution, and "essential and indispensable," at least for St. Louis County, "to the declared objectives and purposes of the county." *Id.*, citing *Premium Standard Farms v. Lincoln Township of Putnam*, 946 S.W.2d 234, 238 (Mo. banc 1997); *Lancaster v. County of Atchison*, 352 Mo. 1039, 180 S.W.2d 706, 709 (Mo. banc 1944); and *Professional Houndsmen v. County of Boone*, 836 S.W.2d 17, 19 (Mo. App. W.D. 1992).

But again, the Court need not reach the question of whether other counties can create boundary commissions, though those counties may not receive the same benefit of doing so as does St. Louis County. It is enough that a broader reading of subsection 72.418.2 is "feasible."

We recognize that to construe § 72.418.2 to entirely avoid the "special law" dispute may mean that the Court must reconsider its interpretation of that subsection in *South Metropolitan Fire Protection Dist. v. City of Lee's Summit*, 278 S.W.3d 659 (Mo. banc 2009). There, in determining who would pay for fire protection services in an area annexed by Lee's Summit, the fire protection district claimed that it was covered by § 72.418.2 rather than § 321.320. The Court addressed the history of the statutes:

> Section 72.418 [was] enacted in House Bill No. 487 as one of seven sections— sections 72.400 to 72.420, RSMo Supp. 1991—to

> address the creation of boundary commissions in certain counties ("St. Louis County Boundary Commission Act"). Pursuant to section 72.400, only a "first class county with a charter form of government which adjoins a city not within a county" could establish a commission. In *O'Reilly v. City of Hazelwood*, 850 S.W.2d 96, 100 (Mo. banc 1993), this Court declared the boundary commission act unconstitutional as a special law because it only authorized St. Louis County to establish a boundary commission.
>
> Following this decision, the legislature enacted Senate Bill No. 256 in 1993, which repealed, amended and added several sections in chapter 321 and chapter 72.
>
> The bill retained the preceding version of section 72.418 as section 72.418.1 and added subsection 2. The section was amended in 1995, adding subsection 3. Nonetheless, St. Louis County is still the only county with a boundary commission.
>
> d. Economic Considerations
>
> The determination of whether the city or the fire protection district provides fire protection services to the annexed property is important because of its economic impact, particularly to the fire protection district. The fire protection district must plan to provide services, invest in infrastructure, and allocate financial resources without control of any possible annexation. Practical and financial considerations of providing fire protection are also important to any annexing city. However, as for the cities, annexation is a voluntary activity. Sections 72.418 and 321.322, although providing different results, craft an economic adjustment to address this concern for both entities.
>
> Pursuant to section 72.418, the fire protection district will continue to provide the fire protection services, but the fire protection district can no longer tax the annexed property except for bonded indebtedness in existence prior to the annexation. To provide the district with the appropriate funding, section 72.418 provides that the city will pay annually to the district what it would have levied on the taxable property in the annexed area.

South Metro. Fire Prot. Dist., 278 S.W.3d at 664-665 (original footnote omitted; footnote added). "To harmonize and give both sections meaning, the conflict

between the two sections [was] resolved [by the Court] by applying section 72.418 to counties with a boundary commission and section 321.320 to counties with no boundary commission." *Id.* at 670.

This Court referred to "counties"—not just a single "county"—"with a boundary commission." The Court did not address whether counties other than St. Louis County could establish such commissions, nor what authority a commission would have in a county in which fewer cities had been established. It appears, simply, that the prospect of other counties creating boundary commissions was not raised and was not essential to the holding in *O'Reilly*. And Jackson County, home of the South Metropolitan Fire Protection District, had not established such a commission.

The fact remains that whatever we might speculate motivated members of the General Assembly when they voted, the words they chose in § 72.418.2 did not include any limitation. That breadth permitted the situation that led to the conflict resolved in *South Metropolitan*. But we are not aware of any precedent saying that when the General Assembly passes a section of a bill that on its face is not "special," enactment of that section nonetheless violates or comes to violate the Missouri Constitution because of some other statute with which the facially general law was later found to conflict. Or, more pertinent in light of the Supreme Court's "harmonization" in *South Metropolitan*, that the General Assembly can be held to have violated the bar on enacting a "special law" because of a subsequent judicial narrowing of the application of the enactment. And in the absence of such precedent, the Court should confirm that reading § 72.418.2 as it was enacted is at least "feasible"—that it is a general law that can apply to annexations in counties other than those "in any county with a charter form of government where fifty or more cities, towns and villages have been established."

C. If read narrowly based on limitations inferred from other sections or statutes, § 72.418.2 is still not a "special law" because the restrictions attributed to it are open-ended.

Plaintiffs' case is based, of course, on the premise that § 72.418.2 can only apply "in a[] county with a charter form of government where fifty or more cities, towns and villages have been established" that has established a boundary commission. In Plaintiffs' view, there are three prerequisites to the application of § 72.418.2 to an annexation. It must be in a county

- with a charter form of government;
- where fifty or more cities have been established; and
- that has established a boundary commission.

Taken individually, each criterion is open-ended:

- *Every* county, when it meets the constitutional requirements, has a right to adopt a charter form of government. *See* Art. VI, § 18(a).
- There is *no limit*, constitutional, statutory, historical, or geographical, on the number of cities that can "have been established" in any county.
- *Any county* that has a charter and in which fifty or more cities have been established can establish a boundary commission.

There is no immutable criterion.

We recognize that in *City of DeSoto v. Nixon*, 476 S.W.3d 282 (Mo. banc 2016), the Court said such criteria are reviewed collectively. Of course, *DeSoto* is a post-*Jefferson County* decision addressing a post-*Jefferson County* enactment. It does not address whether that collective analysis is proper when looking at a pre-*Jefferson County* enactment. And frankly, under the prior standard the individual v. collective distinction may not matter.

Applied to the pre-*Jefferson County*, the *DeSoto* rule would mean that if two or more open-ended criteria combined to transform the package from open-ended to closed—*i.e.*, if the combination changed the combination from

transient to immutable, closing what had been an open end—then the law would be a "special law." But no reasonable hypothetical fitting that model comes to mind.

And § 72.418.2 does not fit that model. That the application of § 72.418.2 requires a charter, a large number of cities, *and* a boundary commission may make it less "likely" or "foreseeable" that the criteria will be met. But the combination remains open-ended. It is possible, even if "not likely," for other counties to qualify. Thus § 72.418.2 is a "general law" under the applicable, pre-*Jefferson County* test, even with the *DeSoto* overlay.

D. If § 72.418.2 were a "special law," there would be an issue of fact with regard to it being "substantially justified" and thus valid.

As this Court recently affirmed, even a "special law" will be upheld if it is "substantially justified":

> A special law can certainly survive constitutional infirmity if the State offers evidence of a substantial justification. In fact, since *O'Reilly [v. City of Hazelwood*, 850 S.W.2d 96, 99 (Mo. banc 1993)], this Court has upheld special laws when the party defending them presented evidence of substantial justification for the special treatment. For example, in *Board of Education of the City of St. Louis v. Missouri State Board of Education*, 271 S.W.3d 1 (Mo. banc 2008), the State established substantial justification for a facially special law by showing the law was passed to address "the long history of state-mandated, segregated schools ... the complexity of the issues, and the difficulty of developing a plan that will ensure that students of all races will have a continuing equal opportunity for a quality, integrated education." *Id.* at 10 …. The State concedes it did not present any evidence of substantial justification in the trial court because it believed the statutes did not meet the Jefferson County presumption of special laws test. By presenting no evidence of substantial justification for the presumed special laws, the State failed to overcome the presumption of constitutional invalidity.

> Of course, special laws like this may be passed by the General Assembly in the future and can survive a special law challenge as long as evidence of substantial justification is offered in the trial court. Because the State failed to present evidence of a substantial justification for the special treatment, portions of SB 5 passed in 2015 violate the Missouri Constitution.

City of Normandy v. Greitens, 518 S.W.3d 183, 196-97 (Mo. banc 2017) (citations and footnotes omitted). If § 72.418 is a "special law," the State is entitled to offer "evidence of substantial justification" sufficient to "overcome the presumption of constitutional invalidity." *See City of Normandy* at 197.

This case was resolved below, of course, on a motion for judgment on the pleadings. There was no room, at that procedural stage, for the "State [to] offer[] evidence of a substantial justification." But the record is not devoid of such evidence.

In response to Plaintiffs' motion for summary judgment, defendants provided the circuit court with an affidavit and expert report from Dr. T.R. Carr. D28. Dr. Carr explained why the General Assembly could have "deemed [St. Louis County] to have the greater need" (*Fire Dist. of Lemay,* 184 S.W.2d at 596) than other areas to protect its fire protection districts against the threat of becoming economically not viable while responsible for providing fire protection to urbanized areas. *See* D28, p. 33. In response, Plaintiffs did not provide the circuit court with evidence to support the claim that there is no substantial justification—to show that fire protection districts elsewhere were similarly threatened—beyond pointing out that there are other counties, other cities, and other fire protection districts. D34, pp. 3-4. We know of no authority for the proposition that the minimal presentation (if that) made by Plaintiffs is sufficient to support summary judgment as to "substantial justification" or any analogous point, and Plaintiffs cite none here. Yet they ask this Court not just to reverse the grant of judgment on the pleadings to the defendants, but

to enter summary judgment for plaintiffs. If the Court determines that § 72.418.2 is a "special law," the Court should remand for the circuit court to take and consider evidence—starting with Dr. Carr's affidavit and report.[2]

E. Plaintiffs waived their untimely claim that such review is now barred because the General Assembly did not comply with the procedural requirements of Art. III, § 42.

Finally, Plaintiffs try to fend off the possibility that the State could show substantial justification by adding a requirement to those set out in *Normandy*, claiming that even a "substantially justified" law fails if the legislature did not give the notice addressed in Art. III, § 42. But the procedural claim was waived—and if not, is time-barred.

Constitutional challenges to the validity of a statute must be brought at the earliest opportunity—and must specifically identify the constitutional provision violated by the allegedly invalid bill. *See*, *e.g.*, *State v. Cerna*, 522 S.W.3d 373 (Mo. App. E.D. 2017); *State v. Newlon*, 216 S.W.3d 180, 184 (Mo. App. E.D. 2007); *State v. Harris*, 564 S.W.2d 561 (Mo. App., 1978). Here, though the Petition and later the First Amended Petition stated "special law" challenges, they did not state a challenge based on Art. III, § 42 with the required specificity.

In Paragraphs 74 and 83 and n.6 of their First Amended Petition (D2, pp. 14-15) Plaintiffs did mention Art. III, § 42. But when they reached Count I, nowhere did Plaintiffs state that an identified bill was procedurally flawed.

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[2] Dr. Carr's report and the material cited therein also go to the question of whether a general law could be made applicable. We know that at least as of the time the General Assembly enacted § 72.418.2, it was permissible for the General Assembly to limit a statute to the class or location that had "the greater need for it." *State ex rel. Fire Dist. of Lemay v. Smith*, 184 S.W.2d at 596. And as Dr. Carr explains (D28), there was and is no other comparable county, with regard to the issues that § 72.418.2 was designed to address—a proposition that Plaintiffs made no attempt to contest in the record below.

And nowhere in the First Amended Petition did they request that the court grant relief as to § 72.418.2 on the basis of such a flaw. Instead, in Count I, they asked for a declaration (D2, p. 18 (¶94)) that "§ 72.418 RSMo. violates Article III, § 40, subsections (21) and (30), of the Missouri Constitution"— not that any statute or any bill violated article III, sec. 42. A claim based on § 42, then, was waived.

And had it not been waived, it would be time-barred. Missouri has a special statute of limitations for procedural challenges:

> 516.500. No action alleging a procedural defect in the enactment of a bill into law shall be commenced, had or maintained by any party later than the adjournment of the next full regular legislative session following the effective date of the bill as law, unless it can be shown that there was no party aggrieved who could have raised the claim within that time.[3]

This case was filed, of course, decades after "adjournment of the next full regular legislative session following the effective date of the bill as law." And none of the Plaintiffs attempted to argue below (or in their brief here) that "there was no party aggrieved who could have raised the claim within that time."

That statute of limitations may explain why this Court was not concerned with notice under Art. III, § 42, in the analogous case it cited in *Normandy*, *Board of Education of the City of St. Louis*. That was a challenge brought in 2008 to a bill passed in 1998.

This is even further outside the limitations period. It was evident from Plaintiffs' Statement of Uncontroverted Facts, that any allegedly deficient bill

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[3] To ensure that the circuit court could apply this limitation if it deemed the constitutional challenge not to have been waived, Defendants requested leave to amend their answers to add the statute of limitations as an affirmative defense. That motion became moot when the circuit court granted judgment on the existing pleadings.

was passed no later than 1999. *See* Plaintiffs' Statement of Uncontroverted Facts, ¶¶ 33-49 (D6 p.6-10). Yet this suit was brought in 2017.

Plaintiffs' procedural challenge was waived and is not timely.

II. Section 72.418 does not violate the prohibition against special laws regulating the affairs of cities. (Responds to Point II)

In addition to their general argument that §72.418.2 is a special law as to which sufficient notice was not given, Plaintiffs argue more specifically that the law fits into one of the categories listed in article III, sec. 40: they claim that §72.418.2 violates art. III, sec. 40(21) because §72.418 impermissibly regulates the affairs of the City of Crestwood. But it does not.[4] The General Assembly has authority to regulate cities as classes—which §72.418 does.

Charter cities have no powers that are limited or denied by statute. *City of Springfield v. Belt*, 307 S.W.3d 649, 653 n. 10 (Mo. banc 2010). Fire protection "comes properly within the police powers of the state." *Easy Living Mobile Manor, Inc. v. Eureka Fire Protection Dist.*, 513 S.W.2d 736, 738 (Mo. App. 1974). Police powers are a governmental function, whose control "remains in the state." *Kansas City v. J. I. Case Threshing Mach. Co.*, 87 S.W.2d 195, 202 (Mo. 1935). The City "has no powers which are not derived from and subordinate to the state." *Id.* at 198.

The state "*may* confer the exercise of police power upon a municipal corporation[,]" and may also delegate the fire protection police power to fire protection districts. *Easy Living Mobile Manor, Inc.* at 738 (emphasis added). Appellants concede that "the state" may delegate the fire protection police

[4] And if it did, Defendants get the opportunity to present evidence of substantial justification. *Bd. of Educ. of City of St. Louis v. Missouri State Bd. of Educ.*, 271 S.W.3d 1, 9-10 (Mo. banc 2008); *id.* at 9, n. 5 (referencing art. III, sec. 40(21)).

power "subject to whatever restrictions it deems appropriate." Apps' Br. at 52. For at least fifty years, fire protection districts have been "empowered to supply protection" to persons and property within city boundaries. Section 321.010.1, RSMo (1969). In order to provide that protection, fire districts have had the power and authority to adopt and amend fire prevention and protection ordinances not in conflict with statutes. Section 321.220(12), RSMo (1969); §321.220(12), RSMo; §321.600(12), RSMo (1969); §321.600(12), RSMo. There is a system of "dual regulation" in every county with a fire protection district. *Jefferson County Fire Protection Districts*, 205 S.W.3d 866, 871 (Mo. banc 2006); *see also* §321.228, RSMo.

The operation of a city fire department is a governmental function. *Donahew v. City of Kansas City*, 38 S.W. 571, 572 (Mo. 1897); *Richardson v. City of St. Louis*, 293 S.W.3d 133, 138 (Mo. App. E.D. 2009). Governmental functions "may be delegated to or taken away from the city in whole or in part, within the wisdom of the Legislature." *J. I. Case Threshing Mach. Co.*, 87 S.W.2d at 202-3. Section 72.418 reflects valid legislative choices concerning the fire protection police power. It does not regulate the affairs of cities within the meaning of art. III, sec. 40(21).

III. Section 321.322.3 should be upheld as a constitutionally valid statute. (Responds to Point III)

In *South Metropolitan Fire Protection Dist. v. City of Lee's Summit*, 278 S.W.3d 659 (Mo. banc 2009), this Court observed:

> The legislature has enacted three statutes that address fire protection services and revenues for property included in a fire protection district and a city. These statutes are sections 321.320, 321.322, and 72.418.

South Metro. Fire Protection Dist. at 661-662 (footnote omitted).

On their faces, the sections (before applying exceptions or exclusions) overlap to a great degree.

- § 321.320 applies to an annexation by a city with a population of 40,000 or more if the city "is not wholly within the fire protection district," and the city has its own fire department.
- § 321.322 applies to an annexation by a city with a population of 2500-65,000, also "not wholly within the fire protection district," and the city has its own fire department.[5]
- § 72.418 applies without limitation–or with limitations inferred from other sources, as Plaintiffs argue.

The Court recognized that "[s]ections 321.320 and 72.418.2 are unambiguous standing separately." 278 S.W.2d at 665. It found a conflict because both sections, as written, applied to the annexation of land in the fire protection district by the City of Lee's Summit—a city with a population of more than 40,000 that was not wholly within the South Metropolitan Fire Protection District—and was thus subject to both statutes, on their faces.[6] The fire protection district sought to apply § 72.418.2 as written; Lee's Summit succeeded in persuading the Court to infer an unwritten limitation on § 72.418.2—*i.e.*, that it applies to counties once they establish boundary

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[5] The City of DeSoto successfully challenged §321.321.4, an exception to the general rule in §321.321.1, even though the general rule did not apply to the city—which was "wholly within the fire protection district." *City of DeSoto v. Nixon*, 476 S.W.3d 282, 285 (Mo. banc 2016).

[6] The conflict that created the problem in *South Metro.* would not exist here. The City of Crestwood had 11,912 residents, according to the 2010 census (Official Manual, State of Missouri, 2013-14, at 850)—and 11,229 in the 1990 census (Official Manual, State of Missouri, 1993-94, p. 900). Section 321.320 would not have applied to the annexation by Crestwood because Crestwood did not meet the minimum threshold.

commissions (which Jackson County had not done)—and instead apply § 321.320.[7]

Plaintiffs challenge § 321.322.3 because the City of Crestwood is a city with a population of between 2500 and 65,000 that is "not wholly within the fire protection district" and that has its own fire department—*i.e.*, it is within the scope of § 321.322. Their challenge largely parallels—and the result should follow the resolution of—their argument with regard to § 72.418.2.

A. The applicable special law test—applied.

Subsection 3, a 1991 addition to the exception to the rule in § 321.322.1, uses an open-ended population criterion:

> 3. The provisions of this section shall not apply in any county of the first class having a charter form of government and having a population of over nine hundred thousand inhabitants.

There is no reason to apply a different test to § 321.322.4 than to § 72.418.2. Indeed, *Greitens* affirms that the former test will be applied to such a longstanding criterion. *City of Normandy v. Greitens*, 518 S.W.3d at 195.

There are just two prerequisites to the application of § 321.322.3. It must be in a county

- with a charter form of government; and
- with a population of over 900,000.

Whether considered individually or together, the criteria are open-ended by any test used before *Jefferson County*. Any county may eventually become a charter county. And any county may reach a population of 900,000. Perhaps population growth in Missouri has recently slowed to the point that today the

[7] Section 321.322 did not apply because according to the 2000 census (the most recent as of the date of annexation), the population of Lee's Summit, 70,000, exceeded the 65,000 cap. *South Metro. Fire Protection Dist.*, 278 S.W.3d at 668, n. 9.

prospect of an additional county reaching that threshold in the foreseeable future is unlikely. But that is not a proper basis for declaring that the General Assembly violated the constitution a quarter century ago.

B. Impact of amended § 1.100

According to Plaintiffs, "the General Assembly removed all doubt" that St. Louis County could ever fall outside of § 321.322.3 "when it amended § 1.100.2" in 2017. Appellants' Br. at 59. But that enactment cannot have the impact that Plaintiffs posit. Again, as noted above, p. 15, n. 1, it is passage that matters under the Constitution. The bar is not on having "special laws"; it is on enacting them. Art. III, § 40 ("The general assembly shall not pass any local or special law" in the following categories). If a law is passed that is not "special" when enacted, but becomes "special" because of some later enactment, it is the later enactment that is constitutionally infirm. Declaring that new bill invalid, perhaps just as applied, returns the law to its prior state. If the enactment of § 1.100.2 transformed § 321.322.3 into a special law, it is the change in § 1.100.2 that is subject to attack, not § 321.322.3.

C. Substantial justification.

Again, even a "special law" will be upheld if it is "substantially justified." *City of Normandy v. Greitens*, 518 S.W.3d at 196-97. And if § 321.322.3, like § 72.418, is a "special law," it is one that serves the purpose discussed by Dr. Carr: to address the unique circumstances of the pattern of urbanization, incorporation, and annexation in St. Louis County. The State presented "evidence of substantial justification" (518 S.W.3d at 197), unrebutted by any factual presentation by Plaintiffs.

D. Procedural requirements of Art. III, § 42.

Again, constitutional challenges to the validity of a statute must be brought at the earliest opportunity—and must specifically identify the

constitutional provision violated. The Petition and, later, the First Amended Petition stated "special law" challenges to § 321.322.3. Count II, D2, p. 19. But they did not state a challenge to § 321.322.3 based on Art. III, § 42—much less a challenge with the required specificity.

In Paragraph 83 of their First Amended Petition (D2, p. 15), Plaintiffs did mention Art. III, § 42 and S.B. 34 (1991). But when they reached Count II, nowhere did Plaintiffs identify the bill that they claim was procedurally flawed. And nowhere in the First Amended Petition did they request that the court grant relief as to § 321.322.3 on the basis of such a flaw. In Count II, ¶ 101, Plaintiffs asked for a declaration that "§ 321.322.3 RSMo. violates Article III, § 40(30), of the Missouri Constitution." D2, p. 15. But that is not enough to meet the requirement for stating a claim as to the violation of a different section, Art. III, § 42, by an unidentified bill. A claim based on § 42, then, was waived.

And like the challenge to § 72.418.2, if this challenge had not been waived, it would be time-barred by the special statute of limitations for procedural challenges, § 516.500. *See* pp. 24-26, *infra*.

IV. Roby and Hoeing have not asserted that the property tax rate levied by the City—to which they pay taxes—exceeds the rate ceiling in art. X, sec. 11(b). (Responds to Point IV)

Article X, sec. 11(b) addresses the maximum tax rate that a political subdivision may levy without obtaining voter approval as provided in art. X, sec. 11(c). *See Green v. Lebanon R-III Sch. Dist.*, 13 S.W.3d 278, 284 (Mo. banc 2000); Mo. Const. art. X, sec. 11(c).

Article X, secs 11(b) and 11(c) predate the Hancock Amendment, art. X, secs 16 through 24, *see Keller v. Marion County Ambulance Dist.*, 820 S.W.2d 301, 301, n. 1 (Mo. banc 1991).

The individual plaintiffs (Roby and Hoeing) pay no taxes to the Affton Fire Protection District. D2, p. 4, ¶¶17, 21, 22. They do not reside within an area served by the District. D2, pp. 3-4, ¶¶15, 21, 22, 25. Roby and Hoeing are not challenging the property tax rate imposed upon them by the City of Crestwood. Plaintiffs have alleged that the City of Crestwood has been making the intergovernmental payment required by §72.418 RSMo. from the City's "general funds." D2, p. 1, ¶1.

If the City imposed a property tax rate in excess of that permitted under art. X, sec. 11(b) without the voter approval that art. X, sec. 11(c) requires to exceed the rate ceilings in sec. 11(b), the proper defendant would be the City of Crestwood, not the fire protection district, and not the State. Further, Plaintiffs do not assert that the actual property tax rate levied for municipal purposes exceeds the rate permitted by article X of the Missouri Constitution. Instead, Plaintiffs suggest that the assessed valuation solely of the area that the City chose to annex in 1997 ($37,231,830.00) be divided by the amount of the intergovernmental payment ($540,518.07) and multiplied by 100[8] in order to arrive at an "effective tax rate" of $1.451763 per hundred dollars of assessed valuation (Apps' Br. at 65) "in the Annexed Area" (Apps' Br. at 66).

Plaintiffs' proposed method of carving out the Annexed Area and examining the *City's* current cost to ensure fire protection services for that area alone is contrary to established precedent. The question is whether the property tax rate levied by the political subdivision imposing the tax exceeds the rate ceiling in art. X, sec. 11(b). Plaintiffs make no such claim.

Article X, secs 11(b) and 11(c) preexisted the Hancock Amendment. Article X, sec. 22(a) prohibits

[8] Dividing $540,518.07 by $37,231,830.00 and multiplying that number by 100 results in $1.451763.

> political subdivisions… from increasing the current levy of an existing tax, license, or fees, above that current levy authorized by law or charter when this section is adopted without the approval of the required majority of the qualified voters of that county or other political subdivision voting thereon.

Mo. Const. art. X, sec. 22(a). In determining whether a levying jurisdiction has violated the Hancock Amendment, "the 'constitution's prohibition is measured against the tax levy imposed by' the" political subdivision levying the tax. *Franklin County ex rel. Parks v. Franklin County Comm'n*, 269 S.W.3d 26, 30 (Mo. banc 2008), *quoting Tax Increment Fin. Comm'n v. J.E. Dunn Constr.*, 781 S.W.2d 70, 74 (Mo. banc 1989). Like article X, sec. 22, article X, secs. 11(b) and (c) focus upon the levy rate, not upon the level of local government spending. *See Keller*, 820 S.W.2d at 302-3.

Plaintiffs' approach to art. X, sec. 11(b) also fails to take into account the uniformity clause, art. X, sec. 3. "[T]axes" must be "uniform upon" the same class or subclass of property "within the territorial limits… of the authority levying the tax." *Armstrong-Trotwood, LLC v. State Tax Comm'n*, 516 S.W.3d 830, 835-36 (Mo. banc 2017). "The term 'taxes' " in art. X, sec. 3 means the "tax *rate*." *Armstrong-Trotwood, LLC* at 836. In contrast, expenses that governmental entities incur to respond to fires and medical emergencies will not, and need not, be uniform throughout the territorial limits of a city or a fire protection district.

Plaintiffs' art. X, sec. 11(b) claim fails for the additional reason that the annual payment from the City to the fire protection district required under §72.418, RSMo, is not a tax. The intergovernmental payment required by §72.418.2 does not meet the definition of "taxes" that this Court has applied to article X of the Missouri Constitution. *See Ehlmann v. Nixon*, 323 S.W.3d 787, 789 (Mo. banc 2010), *quoting Leggett v. Missouri State Life Ins. Co.*, 342 S.W.2d

833, 875 (Mo. banc 1960) (citations omitted). "Taxes are 'proportional contributions imposed by the state upon individuals for the support of government and for all public needs.' " *Leggett* at 875. Section 72.418.2 does not impose the annual payment from the City to the fire protection district upon individuals. *See* §72.418.2, RSMo ("The annexing city shall pay annually to the fire protection district…"). Rather, the payment required by §72.418.2 is an obligation that the City chose to take upon itself when it voluntarily annexed an area served by the Affton Fire Protection District in 1997.

The intergovernmental payments required under §72.418.2 are not levied upon cities by fire protection districts. Section 72.418.2 does not impose any property tax upon the Annexed Area, or upon individuals or persons owning property within the annexing city. Rather, the statute specifically provides that, after "a city having a fire department" has annexed an area served by a fire protection district,

> [s]uch annexed area shall not be subject to taxation for any purpose thereafter by the fire protection district except for bonded indebtedness by the fire protection district which existed prior to the annexation.

§72.418.2, RSMo. Section 72.418.2 does not address how annexing cities may fund the intergovernmental payments. Nothing in §72.418.2 requires the payments from the City to the fire protection district to be made from property tax revenues.

The intergovernmental payments required by §72.418.2, RSMo, are not taxes. They are payments by one political subdivision for services rendered by another—like the tuition payments involved in *Breitenfeld v. School Dist. of Clayton*, 399 S.W.3d 816 (Mo. banc 2013). *See Breitenfeld* at 821, 831-32.

The cases differentiating between "user fees" and "taxes" as those terms are used in

art. X, sec. 22(a), *see e.g. Keller*, 820 S.W.3d at 303, *Zweig*, 412 S.W.3d 223, 226 (Mo. banc 2013), do not make the City's annual payments to the fire protection district under §72.418.2, RSMo, taxes. The intergovernmental payment is not levied upon the City by the fire protection district. Moreover, the City's obligation to make the annual payments to the fire protection district under §72.418.2 was not triggered by "the payer's ownership of property," *see Zweig v. Metro. St. Louis Sewer Dist.*, 412 S.W.3d 223, 237 n. 10 (Mo. banc 2013). Rather, the City's obligation to pay is a statutory obligation triggered by the City's choice to voluntarily annex an area served by a fire protection district. Section 72.418.2, RSMo. It does not matter that the legislature chose to calculate the amount of the intergovernmental payments so that they would equal the amount that a fire district would have levied on the area annexed by a city. *Zweig*, 412 S.W.3d at 237; *see* §72.418.2, RSMo.

V. The City's requirement to make payments to the District under §72.418.2 does not violate Roby or Hoeing's right to due process. (Responds to Point V)

In Count IV, Roby and Hoeing claim that their right to due process was violated because, they say, they are taxed "by the District without representation, are without recourse for the District's actions in increasing their tax liability and are deprived of their property without due process of law." D2, p. 21, ¶112. But Roby and Hoeing do not pay taxes to the Affton Fire Protection District. D2, pp. 3-4, ¶¶15, 21, 22. Roby and Hoeing are not challenging any tax that they pay to the City of Crestwood, where they reside (D2, p. 4, ¶¶21, 22). No extra-territorial imposition of a tax upon Roby or Hoeing is before this Court.

In *Garden of Eden Drainage Dist. v. Bartlett Trust Co.*, 50 S.W.2d 627 (Mo. 1932), this Court emphasized that, regarding an individual's right to be heard and to oppose taxation,

> We do not mean… that a citizen has a right to be heard against the power of the state or its governmental agencies to levy and collect taxes for public purposes, as that is an attribute of sovereignty lodged in the legislative department, but that he has a right to be heard as to whether the purpose is public and as to the lawfulness and proper apportionment of the tax against his property.

Garden of Eden Drainage Dist. at 629.

Plaintiffs have not questioned that fire protection and emergency medical services are public purposes. "The preservation of the public health is a paramount end of the exercise of the police power of the state." *Mahoney v. Doerhoff Surgical Servs, Inc.*, 807 S.W.2d 503, 507 (Mo. banc 1991). Fire districts may operate emergency ambulance services. Sections 321.225, 321.226, RSMo. For purposes of §§321.225 and 321.226, " **'emergency'** means a situation resulting from a sudden or unforeseen situation or occurrence that requires immediate action to save life or prevent suffering or disability." Sections 321.225.5, 321.226.2, RSMo. (emphasis in originals). Providing access to emergency medical services is a public purpose.

Fire protection is one of " 'the privileges of living in an organized society.' " *Commercial Barge Line Co. v. Dir. of Revenue*, 431 S.W.3d 479, 483 (Mo. banc 2014), *quoting Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 623 (1981).

> "The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes."

President Riverboat Casino-Missouri, Inc. v. Missouri Gaming Comm'n, 13 S.W.3d 635, 640 (Mo. banc 2000), *quoting Commonwealth Edison Co.*, 453 U.S. at 622-23.

Roby and Hoeing contend that "Section 72.418.2 simply mandates that Roby and Hoeing make the payments demanded, in the amount set by the District." Apps' Br. at 71. But the City of Crestwood, having chosen to bring itself within the scope of §72.418, makes the payments required by §72.418.2. Section 72.418.2, RSMo; D2, p. 6, ¶¶ 26, 27. The statute refers to "[t]he amount to be paid by the municipality to the fire protection district… ." Section 72.418.2, RSMo. The plain language of the statute requires the City to make the annual payments, not individual property owners or taxpayers. Section 72.418.2, RSMo ("The annexing city shall pay annually to the fire district… .").

Moreover, Plaintiffs and others who own taxable property within the City of Crestwood are free to challenge the tax rate, or the lawfulness of their assessments, by paying under protest and suing the county collector. *Bartlett v. Ross*, 891 S.W.2d 114, 116 (Mo. banc 1995); *see* §139.031, RSMo. That remedy affords due process. *B&D Inv. Co., Inc. v. Schneider*, 646 S.W.2d 759, 763-64 (Mo. banc 1983). Roby and Hoeing have chosen not to access that remedy.

The City's residents can express their views at city council meetings, or convey their objections to city officials or their fellow citizens generally through other means. Roby and Hoeing speculate that making "their objections known to their elected officials would be unavailing." Apps' Br. at 70-71. Plaintiffs could advocate for the deannexation of the area served by the fire protection district. If they think their elected officials are ignoring them, Roby and Hoeing can support other candidates for public office. Plaintiffs also have opportunities to voice objections during the process of paying under protest, and suing the county collector.

VI. The District's 2012 and 2017 property tax levy increases were approved by the required majority of the qualified

voters of the District as required by article X, sec. 22(a). (Responds to Point VI)

"[T]he objectives of the Hancock Amendment as clearly understood by the voters" were "to control and limit governmental revenue and expenditure increases." *Boone County Court v. State*, 631 S.W.2d 321, 325 (Mo. banc 1982), superseded, in part, by art. VI, sec. 11, as amended in 1986, *see Missouri Prosecuting Attorneys v. Barton County*, 311 S.W.3d 737, 745 (Mo. banc 2010). The Hancock Amendment's "central purpose… is to limit taxes by establishing tax and revenue limits and expenditure limits for the state and other political subdivisions which may not be exceeded without voter approval." *Buchanan v. Kirkpatrick*, 615 S.W.2d 6, 13 (Mo. banc 1981).

To that end,

art. X, sec. 22(a) provides, in pertinent part, that:

> Counties and other political subdivisions are hereby prohibited from levying any tax, license or fees, not authorized by law, charter or self-enforcing provisions of the constitution when this section is adopted or from increasing the current levy of an existing tax, license or fees, above that current levy authorized by law or charter when this section is adopted without the approval of **the required majority of the qualified voters of that** county or other **political subdivision voting thereon**.

Mo. Const. art. X, sec. 22(a) (emphasis added). This does not mean that, where local government entities cooperate or join together to provide services to their citizens, the voters of each political subdivision or municipality must approve the taxes or expenditures of every participating public entity. Nor does art. X, sec. 22(a) entitle individuals who are not qualified voters of a political subdivision that seeks to increase a tax levy to vote on the proposed increase.

Fire protection districts are "political subdivisions of this state." *Chesterfield Fire Prot. Dist. of St. Louis County v. St. Louis County*, 645 S.W.2d

367, 371 (Mo. banc 1983); Section 321.010 RSMo. A majority of the qualified voters of a fire protection district may vote to increase the district's property tax levy "to be used for the support of the district[,]" §321.241, RSMo. *See* Mo. Const. art. X, sec. 22(a). There was no art. X, sec. 22(a) violation sufficiently alleged in the First Amended Petition. More than sixty percent of the voters within the territorial limits of the Affton Fire Protection District approved property tax levy increases for the support of the District in 2012 and 2017. D2, pp. 8-9, ¶¶44-48. Voters in the Annexed Area of Crestwood, who continued to be served by the fire protection district (D2, p. 5, ¶25), took part in those elections. D2, p. 8, ¶¶48, 50; Section 72.418.2, RSMo.

Plaintiffs' contention that §72.418.2 enables some residents of the City of Crestwood (those living in the "Annexed Area") "to vote to increase the tax burden on the remaining residents of Crestwood, while their own tax burden remains unaffected[ ]" (see Apps' Br. at 77) is incorrect. The residents of the City of Crestwood—regardless of whether they live in the Annexed Area or elsewhere in the City—pay no taxes to the Affton Fire Protection District. D2, p. 4, ¶17, p. 5, ¶¶24, 25; see D2, p. 4, ¶¶21, 22.

If the City wished to increase its property tax levy, City residents like Roby and Hoeing would be able to vote for or against the proposed increase. But the First Amended Petition does not allege that the City of Crestwood has increased its property tax levy rate since it annexed the area served by the District. Nor have Plaintiffs alleged that the City of Crestwood has increased the rate of any other tax, e.g., sales tax, since the 1997 annexation.

The City is not a defendant in this action. If the City violated the Hancock Amendment, Roby and Hoeing could sue the City. Contrary to Roby and Hoeing's assertion, §72.418.2 does not require (or authorize) the City of Crestwood to "collect" the increased levy rates of the Affton Fire Protection

District. The City merely makes an annual payment to the District. Section 72.418.2, RSMo.

Plaintiffs' reliance upon *City of Hazelwood v. Peterson*, 48 S.W.3d 36 (Mo. banc 2001) is misplaced. In *City of Hazelwood*, this Court invalidated the election by which the voters had approved a tax increase. *Id.* at 38, 39. The Court determined that an election that a circuit court had set aside as void "cannot constitute voter approval for purposes of article X, section 22(a)." *City of Hazelwood*, 48 S.W.3d at 39. Roby and Hoeing have not asserted that the 2012 or 2017 election results approving the increases in the fire protection district's levy have been invalidated. Plaintiffs do not claim that an election contest was even filed concerning the fire district's levy increases, and the time for filing a petition to contest the 2012 or 2017 elections is long past, *Beatty v. Metro. St. Louis Sewer Dist.*, 700 S.W.2d 831, 834 (Mo. banc 1985), *quoting* §§115.553.2, 115.557 RSMo.

The First Amended Petition includes allegations that the qualified voters living within the territorial limits of the Affton Fire Protection District approved property tax levy increases for the support of the District in 2012 and 2017. D2, pp. 8-9, ¶¶44-48. That satisfies the requirements of art. X, sec. 22(a). Plaintiffs do not claim that any qualified voter residing within the boundaries of the District was not permitted to vote on the questions of the 2012 or 2017 tax rate increases.

Finally, a payment from a city to a fire protection district pursuant to a statutory formula—even if that payment equals the amount of the property tax revenues that the fire protection district would otherwise receive—is not " 'a tax, license or fee' within the meaning of article X, section 22." *City of Hazelwood*, 48 S.W.3d at 40. The City of Crestwood makes the payments required by §72.418. Section 72.418.2, RSMo; D2, ¶¶ 26, 27.

VII. Section 72.418 does not violate article X, secs 16 or 21. (Responds to Point VII)

Section 72.418.2 does not impose a new or increased service or activity upon the City of Crestwood. The statute maintains the pre-annexation responsibility of the Affton Fire Protection District to provide services within the District's territorial limits. *See* §72.418.2, RSMo. Interestingly, since at least 1969, fire protection districts have been "empowered to supply protection" to persons and property within city boundaries. Section 321.010.1, RSMo (1969).

There would be no Hancock Amendment violation even if §72.418 did shift "the responsibility for an existing activity or service among local political subdivisions." *Breitenfeld v. Sch. Dist. of Clayton*, 399 S.W.3d 816, 831 (Mo. banc 2013). The "aim" of art. X, secs 16 and 21 is to prohibit burden-shifting from the State to a local entity. *Breitenfeld*, 399 S.W.3d at 831. The Hancock Amendment does not prohibit the legislature from shifting responsibilities to provide services— literally or financially—from one political subdivision to another because "the amendment is not intended to be applied to prevent a statute's reallocation of responsibilities among political subdivisions." *Breitenfeld* at 831.

By voluntarily annexing an area served by the Affton Fire Protection District, the City chose to assume the responsibility for making the annual payment required by §72.418.2. In 1996, the City of Crestwood had three options: (1) to not annex the area served by a fire protection district, (2) to annex, but close the City's fire department, and (3) to annex, but continue to operate its own fire department. The City of Crestwood and its residents—including Plaintiff Roby—were on notice that, if the City chose the third option, the Affton Fire Protection District would continue to provide services within

the Annexed Area, and the City would pay for those services as provided in §72.418.2.

Today, the City could choose to discontinue its fire department. There is no statute mandating that the City operate a fire department. Rather, the legislature has provided options for cities that do not maintain fire departments. For example, fire protection districts are empowered to protect persons and property within cities, towns, and villages. Section 321.010.1, RSMo. Or,

> [a]ny incorporated city in this state having a fire department may contract to furnish fire protection to any other incorporated city or cities in this state, *whether or not such* other incorporated *city* or cities *have a fire department*.

Section 71.370, RSMo (emphasis added).

Plaintiffs note that the Affton Fire Protection District has increased its property tax levy, which, in turn, has increased the amount of the annual payment from the City to the District. See Apps' Br. at 81. The District's choice to provide additional and higher quality services for the benefit of those it serves (D28, pp. 38-39) does not violate Plaintiffs' constitutional rights. *See Breitenfeld*, 399 S.W.3d at 831, n. 27. Finally, Roby and Hoeing did not allege, and have presented no evidence, that the City of Crestwood increased its property tax levy, or the rate of any other tax, since the 1997 annexation of the area served by the Affton Fire Protection District.

CONCLUSION

For these reasons, Respondents respectfully request that the Court affirm the judgment in their favor.

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that Respondents' Brief was electronically filed and served via Missouri Case.Net this 14th day of June, 2019, upon:

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I hereby certify that this brief contains the information required by Rule 55.03, complies with the limitations contained in Rule 84.06(b), and contains 12,049 words exclusive of cover, signature block, and certificates.

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