SC97653

IN THE SUPREME COURT OF MISSOURI

CITY OF CRESTWOOD, et al.,

Plaintiffs-Appellants,

vs.

AFFTON FIRE PROTECTION DISTRICT, et al.,

Defendants-Respondents.

Appeal from the Circuit Court of Cole County, Missouri
The Honorable Jon E. Beetem, Circuit Judge, Division 1
17AC-CC00281

APPELLANTS' BRIEF

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JURISDICTIONAL STATEMENT

This Court has "exclusive appellate jurisdiction in all cases involving the validity of … a statute or provision of the constitution of this state…." Mo. Const. art. V, § 3. This case involves the constitutionality of §§ 72.418 and 321.322.3, RSMo. Accordingly, this Court has jurisdiction to review the trial court's judgment. Appellants' First Amended Petition alleged that these statutes are unconstitutional special laws in violation of Mo. Const. art. III, § 40(21) and § 40(30). Appellants' First Amended Petition also alleged that these statutes violate Mo. Const. art. X, § 11(b), the due process clauses of the Missouri and U.S. Constitutions, and Mo. Const. art. X, §§ 16, 21, and 22. Appellants appeal the trial court's judgment granting Respondents' motion for judgment on the pleadings and denying Appellants' motion for summary judgment, in which the trial court found that §§ 72.418 and 321.322.3, RSMo. did not violate the aforementioned provisions of the Missouri Constitution. The trial court entered its final judgment on December 12, 2018. Appellants appeal the trial court's final judgment pursuant to § 512.020(5), RSMo. This appeal is timely pursuant to Missouri Supreme Court Rules 75.01 and 81.04.

Scope of This Court's Review

The trial court's judgment "sustain[ed] Defendants' motion for judgment on the pleadings, and denie[d] Plaintiffs' motion for summary judgment." D38 p. 10; App A12. "Generally, the denial of a motion for summary judgment is not a final judgment that may be reviewed on appeal. When the merits of that motion, however, are inextricably intertwined with the issues in an appealable summary judgment in favor of another party, then that denial may be reviewable." Lopez v. Am. Family Mut. Ins. Co., 96 S.W.3d 891, 892 (Mo. App. W.D. 2002). Where "the denial of one motion leads directly to the conclusion that the other should be granted," review of denial of a motion for summary judgment is appropriate. Id.

This principal is equally applicable where the court grants a motion for judgment on the pleadings and denies the opposing party's motion for summary judgment. In Seay v. Jones, 439 S.W.3d 881, 887 (Mo. App. W.D. 2014), the court stated:

> Seay's motion for summary judgment was the converse of the defendants' motions for judgment on the pleadings…. Each side's motions could virtually be read as briefs in opposition to the motion or motions filed by the other side. In these circumstances, the denial of Seay's motion for summary judgment is inextricably intertwined with the grant of the defendants' motions for judgment on the pleadings, and it is therefore reviewable here.

Here, the issues in Appellants' motion for summary judgment are inextricably intertwined with Respondents' motion for judgment on the pleadings in that Respondents defended the constitutionality of the pertinent statutes in each count, while Appellants asserted that the statutes are unconstitutional. A decision denying Respondents' motion for judgment on the pleadings would lead directly to the conclusion that Appellants' motion should be granted. Therefore, this Court must review the propriety of the trial court's decision denying Appellants' motion for summary judgment as well as the decision granting Respondents' motion for judgment on the pleadings.

STATEMENT OF FACTS

Appellant the City of Crestwood (the "City" or "Crestwood") is a constitutional charter[1] city in St. Louis County, Missouri, with a population[2] of 11,912. D2 pgs. 2-3. Respondent Affton Fire Protection District (the "District") is a fire protection district established pursuant to Chapter 321, RSMo. to provide fire protection services to an unincorporated portion of St. Louis County adjacent to Crestwood. D2 p. 3. Crestwood annually levies and collects an ad valorem property tax for general municipal purposes. D2 p. 4. The District annually levies and collects an ad valorem property tax to provide fire protection service, ambulance service, dispatching service, and to provide pensions for its employees. D2 p. 4. The District does not levy a property tax to pay bonded indebtedness. D2 p. 6; D6 p. 4.

In 1997, Crestwood annexed unincorporated territory that was within the boundaries of the District (the "Annexed Area"). D2 p. 4. Appellants Gregg Roby ("Roby") and Stefani Hoeing ("Hoeing") are residents and taxpayers of Crestwood residing within the City, but not within the Annexed Area. D2 p. 4. Hoeing moved to Crestwood in 2014. D16 p. 1. Roby and Hoeing annually pay property tax to Crestwood. D2 p. 4.

Every year since this annexation, Crestwood has been required by § 72.418.2, RSMo. to pay to the District "an amount equal to that which the fire protection district would have levied on all taxable property within the annexed area." D2 p. 5. As mandated by § 72.418.2, the District has continued to provide fire protection service to the Annexed Area following the 1997 annexation, but does not collect an ad valorem property tax in the Annexed Area. D2 p. 5. Pursuant to § 72.418.2, the "amount to be paid annually by [Crestwood] to the fire protection district pursuant hereto shall be a sum

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1 "[All] courts shall take judicial notice" of a city's charter. Mo. Const. art. VI, § 19.

2 Unless otherwise noted, all population figures herein are derived from the 2010 U.S. Census. Population data from the U.S. Census is subject to judicial notice. *See* § 490.700, RSMo.; *see also* Matter of Missouri-Am. Water Co., 516 S.W.3d 823, 826, n. 4 (Mo. banc 2017) ("Missouri courts can take judicial notice of population figures listed in each U.S. census.").

equal to the annual assessed value multiplied by the annual tax rate as certified by the fire protection district to the municipality … per one hundred dollars of assessed value in such area." For the year 2017, the total assessed valuation in the Annexed Area was $37,231,830.00. D10 p. 5.

In 1998, Crestwood paid $196,080.00 to the District pursuant to § 72.418.2. D10 p. 3. In 2017, Crestwood was required to pay $540,518.07 to the District due to this statute. D10 p. 3; D27 p. 6. From 1998 through 2017, Crestwood has paid over six million dollars to the District under the mandate of § 72.418.2. D5 p. 1.

In 2012 and in 2017, the District held elections to increase its annual property tax rate. D2 pgs. 8-9. In both cases, the tax increases were approved by the voters within the District. D2 p. 9. Pursuant to § 72.418.2, Crestwood residents in the Annexed Area were eligible to vote on the District's 2012 and 2017 property tax increases, though these taxes are not directly assessed or collected by the District on their property. D2 p. 9. Crestwood residents within the Annexed Area are also permitted to vote in elections for the District's board of directors. Pursuant to § 72.418.2, Roby and Hoeing, as taxpayers of Crestwood residing outside the Annexed Area, were not permitted to vote in these elections. Section 72.418 also does not allow them to vote in elections regarding tax increases, though they bear a *per capita* share of the annual payment that Crestwood is required to pay to the District. D2 pgs. 9-10. After the 2012 and 2017 elections, the annual payment required by § 72.418 increased[3] by approximately $100,000.00. D5 p. 1; D27 pgs. 5-6.

Crestwood's fire department inspects buildings and enforces ordinances related to fire protection throughout the City, but does not enforce those ordinances within the Annexed Area. D17 p. 1; D18 pgs. 1-24. The District has also enacted fire protection ordinances applicable within its boundaries. D22 pgs. 1-24. All of the District's fire

[3] In 2011, the annual payment by Crestwood to the District was $344,196.64. After the 2012 tax increase by the District, the annual payment increased to $450,779.15. D5 p. 1. In 2016, Crestwood was required to pay $444,604.58. After the 2017 tax increase, the payment increased to $540,518.07. D5 p. 1.

stations are located outside the Annexed Area, and the District owns no real or personal property situated within the Annexed Area. D2 p. 11; D6 p. 8; D27 p. 11.

A. The Boundary Commission Act

Only cities in St. Louis County are affected by § 72.418, because § 72.418 is contained within the Boundary Commission Act; §§ 72.400 through 72.430, RSMo. The Boundary Commission Act governs "boundary changes," which is defined in § 72.400(2), RSMo. as "any annexation, consolidation, incorporation, transfer of jurisdiction between municipalities or between a municipality and the county, or combination thereof…." The Boundary Commission Act applies *only* 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…." § 72.401.2, RSMo.[4]

1. "Any county with a charter form of government"

Missouri has 114 counties, in addition to the City of St. Louis. St. Louis County is one of four counties (the others being Jackson, Jefferson and St. Charles) which have a charter[5] form of government. D2 p. 7. Article VI, § 18(a) of the Missouri Constitution provides that a county must attain first class status and maintain such status for two years, or have a population in excess of 85,000 inhabitants in order to adopt a charter. Fourteen counties in Missouri (Boone, Buchanan, Camden, Cape Girardeau, Cass, Christian, Clay,

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[4] Subsection 1 of § 72.401 restates the criteria for §§ 72.400 – 72.430 to apply, stating that "[i]f a 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." Though stated slightly differently, the criteria in subsections 1 and 2 defining where §§ 72.400 through 72.430 apply are equivalent.

[5] St. Louis County (adopted in 1968); Jackson County (adopted in 1970); St. Charles County (adopted in 1992); Jefferson County (adopted in 2008). This Court takes judicial notice of county charters. *See* Mo. Const. art. VI, § 18(j).

Cole, Franklin, Greene, Jasper, Platte, St. Francois, and Taney) have attained first class status but have not adopted a charter. D2 p. 7. None of the remaining counties in Missouri have a population in excess of 85,000 inhabitants. Newton County, a second class county with a population of 58,845, is the closest. D2 p. 7.

2. "Fifty or more cities, towns and villages have been established"

Presently, St. Louis County has approximately ninety municipalities. D2 p. 7. None of the other three charter counties has more than eighteen cities, towns or villages established therein (Jackson – 18; Jefferson – 14; and St. Charles – 18). D2 p. 7. Of the first class, non-charter counties, Jasper County has the most cities, towns and villages, with twenty-three. In no other county have more than twenty-three municipalities been established. D2 p. 7. Since 1992, only thirteen municipalities (Alton, Bull Creek, Coney Island, Grand Falls Plaza, Highlandville, Lake Lafayette, Loma Linda, McCord Bend, Miramiguoa Park, Pierpont, Pinhook, River Bend, and Wildwood) have been incorporated[6] in the entire state of Missouri, with the most recent in 2004. D10 p. 13.

3. "Such county has by ordinance established a boundary commission"

On October 5, 1989, St. Louis County adopted Ordinance 14,628, amending Chapter 401 of the St. Louis County Revised Ordinances to establish the St. Louis County Boundary Commission. D23 pgs. 1-3. On July 5, 1995, St. Louis County adopted Ordinance 17,623, revising Chapter 401's provisions regarding the boundary commission. D24 pgs. 1-4. On July 9, 1999, St. Louis County adopted Ordinance 19,527, amending Chapter 401 into its current form. D25 pgs. 1-5.

Of the 114 counties in Missouri, only St. Louis County meets all of the criteria in § 72.401 to trigger the application of the Boundary Commission Act (charter form of government, more than fifty municipalities, and established a boundary commission by ordinance). D2 p. 6. It is the only county which has established a boundary commission and it is the only county in which adoption of a boundary commission ordinance would trigger the application of §§ 72.400 through 72.430. D2 p. 7.

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6 *See* 2017-2018 Official Manual of the State of Missouri, pgs. 841-860. Courts take judicial notice of the incorporation of cities. *See* §§ 77.010, 79.010, RSMo.

4. "Boundary Changes" outside St. Louis County

In all other counties in Missouri, "boundary changes" are governed by a different set of statutes. Chapter 71, RSMo. governs annexations in most other counties in Missouri, "except as provided in … sections 72.400 to 72.420." *See* § 71.860, RSMo. Incorporation of cities is governed by § 72.080, RSMo., which applies statewide, except within a county "any county with a charter form of government where fifty or more cities, towns and villages have been incorporated...." *See* § 72.080.3, RSMo. In such a county, "an unincorporated city, town or other area of the state shall not be incorporated *except as provided in sections 72.400 to 72.420*." Id. Emphasis added. In all other counties outside St. Louis County, consolidation is governed by §§ 72.150 through 72.220, RSMo. Section 72.150 states that "[a]ny cities, towns or villages within any county with a charter form of government where fifty or more cities, towns and villages have been incorporated *shall consolidate pursuant to the provisions of section 72.420*." Emphasis added. Sections 72.080.3 and 72.150 both exclude St. Louis County from their provisions *regardless* of whether it has established a boundary commission.

Because St. Louis County is the only county which meets the criteria necessary to trigger application of §§ 72.400 through 72.430, only cities in St. Louis County are subject to the provisions of § 72.418.

B. Historical Development of the Boundary Commission Act and § 72.418

Section 72.418 was not originally a part of the Boundary Commission Act. The Boundary Commission Act was enacted by the General Assembly[7] in 1989 by the adoption of House Bill 487. As enacted by House Bill 487 (1989), § 72.400, RSMo. prohibited annexation or consolidation in "any first class county with a charter form of government which adjoins a city not within a county" until January 1, 1990, and provided that, after January 1, 1990, "if the governing body of such county has by ordinance established a boundary commission … then annexation, incorporation and consolidation

[7] "The courts take judicial notice of the records of the general assembly." State ex rel. Snip v. Thatch, 195 S.W.2d 106, 107 (Mo. 1946).

in such county shall proceed" through the boundary commission. 1989 Mo. Laws, pgs. 465-466. App A34-A35. The Boundary Commission Act was modified in 1991 by the enactment of Senate Bill 402, which, among other things, enacted § 72.401, RSMo., providing that "[i]f a [boundary] commission has been established pursuant to section 72.400, any boundary change within the county shall proceed solely and exclusively in the manner provided for by sections 72.400 to 72.420…." 1991 Mo. Laws, pgs. 493-497; App A69.

On March 23, 1993, this Court invalidated the Boundary Commission Act as an unconstitutional special law that "authorizes the creation of a boundary commission only by 'any first class county with a charter form of government which adjoins a city not within a county,'" and declared all of the St. Louis County Boundary Commission's acts void. O'Reilly v. City of Hazelwood, 850 S.W.2d 96, 99-100 (Mo. banc 1993). On May 19, 1993, the General Assembly passed Senate Bill 256 with an emergency clause, enacting subsections 2 and 3 of § 72.418, which stated, in pertinent part, as follows:

> 2. Fire protection districts serving the area included within any annexation by a city having a fire department, including simplified boundary changes, shall continue to provide fire protection services, including emergency medical services to such area. The annexing city shall pay annually to the fire protection district an amount equal to that which the fire protection district would have levied on all taxable property within the annexed area. Such 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. The amount to be paid annually by the municipality to the fire protection district pursuant hereto shall be a sum equal to the annual assessed value multiplied by the annual tax rate as certified by the fire protection district to the municipality, including any portion of the tax created for emergency medical service provided by the district, per one hundred dollars of assessed value in such area….
>
> 3. The provisions of this section shall apply to all boundary changes pending before any boundary commission on and after May 19, 1993.

1993 Mo. Laws, pgs. 924-928; App A74-A75. The emergency clause in Senate Bill 256 stated that "[b]ecause immediate action is necessary to provide several municipalities

who have annexation proposals pending before the boundary commission, and because there is a dispute as to fire protection and emergency medical services jurisdiction between municipal fire departments and fire protection districts, this act is deemed necessary for the immediate preservation of the public health, welfare, peace and safety, and is hereby declared to be an emergency act within the meaning of the constitution, and this act shall be in full force and effect upon its passage and approval." 1993 Mo. Laws, pgs. 924-928; App A77.

On May 26, 1994, this Court again invalidated the Boundary Commission Act because it did not apply equally to all first class counties, in violation of Mo. Const. art. VI, § 8. *See* State ex rel. City of Ellisville v. St. Louis County Bd. of Election Comrs., 877 S.W.2d 620, 623 (Mo. banc 1994). Subsequent to this decision, art. VI, § 8 was amended on April 4, 1995, to be effective retroactively, to cure the defect at issue in the City of Ellisville case. D10 p. 8.

In 1995, the General Assembly amended § 72.401, by the passage of House Bill 446, effective June 2, 1995, to state that "[i]f a commission has been established pursuant to section 72.400, any boundary change within the county shall proceed solely and exclusively in the manner provided for by sections 72.400 to 72.420, notwithstanding any statutory provisions to the contrary concerning such boundary changes." 1995 Mo. Laws, p. 321; App A88. House Bill 446 also amended § 72.418 to repeal subsection 3, and to enact a new subsection 3 in lieu thereof, which stated "[t]he fire protection district may approve or reject any proposal for the provision of fire protection and emergency medical services by a city." 1995 Mo. Laws, p. 320; App A87. House Bill 446 also amended § 72.401 to state that, after a moratorium lasting until one hundred and twenty days after June 2, 1995, there shall be no annexation, incorporation, or consolidation in "any county with a charter form of government where fifty or more cities, towns and villages have been established" unless "the governing body of such county has by ordinance established a boundary commission," in which case, "annexation, incorporation and consolidation in such county shall proceed only as provided in sections 72.400 to 72.420." 1995 Mo. Laws, pgs. 321-322; App A88-A89.

In 1996, the General Assembly amended subsection 2 of § 72.418 by the passage of Senate Bill 735 to add a sentence stating: "[n]otwithstanding any other provision of law to the contrary, the residents of an area annexed on or after May 26, 1994, may vote in all fire protection district elections and may be elected to the fire protection district board of directors." 1996 Mo. Laws, pgs. 689-691; App A93. Section 72.401.1 was amended to its present form by the General Assembly in 1999 by the passage of Senate Bill 160 to state that "[i]f a commission has been established pursuant to section 72.400 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 72.420…." 1999 Mo. Laws, p. 1125.

While the criteria limiting where the Boundary Commission Act applies have changed, the General Assembly always employed criteria limiting its scope to St. Louis County. None of the bills[8] enacting and amending §§ 72.400 and 72.401 recited that notice was published in the localities affected. Similarly, none of the bills[9] enacting and amending § 72.418 recited that notice was published in the localities affected as required by Mo. Const. art. III, § 42.

C. § 321.322, RSMo.

While § 72.418.2 governs the relationship between an annexing city and a fire protection district in a county subject to the Boundary Commission Act, another statute governs such a relationship for all other counties in Missouri. In all other counties aside from St. Louis County, the relationship between an annexing city and fire protection district is governed by § 321.322, RSMo.

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[8] House Bill 487 (1989), Senate Bill 402 (1991), Senate Bill 571 (1992), House Bill 446 (1995), House Bills 1557 & 1489 (1996), Senate Bill 809 (1998), Senate Bills 160 & 82 (1999), House Bill 1967 (2000), Senate Bill 665 (2012), and House Bill 511 (2015).

[9] House Bill 487 (1989), Senate Bill 571 (1992), Senate Bill 256 (1993), House Bill 446 (1995), Senate Bill 735 (1996), Senate Bills 160 & 82 (1999), and House Bill 1967 (2000).

Under § 321.322.1, if "any property located within the boundaries of a fire protection district shall be included within a city … which is not wholly within the fire protection district and which maintains a city fire department, then upon the date of actual inclusion of the property within the city … the city shall within sixty days assume by contract with the fire protection district all responsibility for payment in a lump sum or in installments an amount mutually agreed upon by the fire protection district and the city for the city to cover all obligations of the fire protection district to the area included within the city…." Thereafter, the fire protection district must convey its real and personal property within the area to the city "and the fire protection district shall no longer levy and collect any tax upon the property included within the corporate limits of the city…." § 321.322.1, RSMo. However, "if the city and the fire protection district cannot mutually agree to such an arrangement, then the city shall assume responsibility for fire protection in the annexed area on or before January first of the third calendar year following the actual inclusion of the property within the city," and a drawdown period set forth in subdivisions (1) through (5) of subsection 1 is triggered.

Under this drawdown period, in the first year, the fire protection district receives from the city a payment equal to 100% of what the fire protection district would have levied in property tax in the area. Id. In the following year, the fire protection district receives four-fifths of what it would have levied in property tax. Id. The amount the fire protection district receives is annually reduced by one-fifth until, after the sixth year following annexation, the fire protection district receives no further revenue to compensate it for lost property tax revenue. Id. The city assumes fire protection services in the annexed area in the third year after annexation. Id. Alternately, the city and fire district have the option to "negotiate contracts … for mutually agreeable services." Id.

Section 321.322.1 gives a city and a fire protection district three options following the city's annexation of territory served by the fire protection district: (1) the city assumes the fire protection district's obligations and purchases its real and personal property in the area within sixty days; (2) the city assumes responsibility for fire protection service by the third year after annexation, and the fire protection district receives a gradually

decreasing percentage of its property tax revenue from such area over a five-year period; or (3) the city negotiates with the fire protection district for mutually agreeable services.

These three options are not available to cities in St. Louis County because the General Assembly has excluded St. Louis County from the statute's reach. Instead, cities in St. Louis County must comply with § 72.418. While § 321.322 applies to all other cities in Missouri outside of St. Louis County, § 321.322 used a different mechanism to exclude St. Louis County than the criteria used by the Boundary Commission Act to exclude cities in St. Louis County. Subsection 3 of § 321.322 provides that "[t]he 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." Only St. Louis County has a population over 900,000 inhabitants.

D. County Populations

As measured by the 2010 U.S. Census, St. Louis County's population was 998,882. The next most populous county – Jackson County – was measured as having a population of 674,158. After Jackson County, the next most populous county is St. Charles County, with a population of 360,485.

According to the U.S. Census, the four charter counties in Missouri had the following populations[10] in the years indicated:

	1970	1980	1990	2000	2010
St. Louis Co.	951,353	973,896	993,529	1,016,315	998,882
Jackson	654,178	629,266	633,232	654,880	674,158
St. Charles	92,954	144,107	212,097	283,883	360,485
Jefferson	105,248	146,183	171,380	198,099	218,733

[10] The population data for each county derived from the decennial U.S. Census for 1970, 1980, 1990, 2000, and 2010 is listed in the following: 1970 Census of the Population, U.S. Department of Commerce, Characteristics of Population, Missouri, pgs. 27-20-27-21; 1980 Census of Population, U.S. Department of Commerce, Number of Inhabitants, Missouri, pgs. 27-8-27-11; 1991-1992 Official Manual of the State of Missouri, pgs. 690-732; 2001-2002 Official Manual of the State of Missouri, pgs. 830-884; 2017-2018 Official Manual of the State of Missouri, pgs. 768-839.

Since the enactment of § 321.322, no other charter county had a population of 900,000, and no other county is likely to have a population of 900,000 for the foreseeable future.

E. Historical Development of § 321.322, RSMo.

When § 321.322 was first enacted by House Bill 167 in 1985, the statute provided that if a city annexed territory served by a fire protection district, "one-fifth of the assessed valuation of such property shall be excluded from the tax rolls of the fire protection district and included on the tax rolls of the city on January first of each of the first five calendar years occurring after the date on which the property was included within the city…." In 1985, subsection 3 of § 321.322 provided that "[t]he provisions of this section shall not apply in any county of the first class having a charter form of government and not containing any portion of a city with a population of over three hundred fifty thousand…." 1985 Mo. Laws, p. 774; App A26. When this section was enacted, there were only two charter counties – St. Louis County and Jackson County. Subsection 3 excluded St. Louis County from § 321.322.1, but not Jackson County, since it contains a portion of Kansas City, which had a population over 350,000.[11]

Subsection 3 of § 321.322, RSMo. was amended in 1991 by the passage of Senate Bill 34, which repealed the aforementioned language, and enacted in lieu thereof language stating that "[t]he 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." 1991 Mo. Laws, pgs. 402-403; App A66. This amendment was necessary because St. Charles County would, upon the adoption of its charter in 1992, have been a "county of the first class having a charter form of government and not containing any portion of a city with a population of over" 350,000. Had Senate Bill 34 not been enacted, cities in St. Charles County would have been excluded from § 321.322.1. Accordingly, the General Assembly amended subsection 3 to ensure that the statute continued to apply to all cities in Missouri, except those in St.

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[11] Kansas City population: 2010: 459,787; 2000: 441,545; 1990: 435,146; 1980: 448,028. *See* 2010 Census of the United States – Missouri, Table 10.

Louis County. None of the bills[12] enacting and amending § 321.322 recited that notice was published in the localities affected as required by Mo. Const. art. III, § 42.

F. This Lawsuit

On May 25, 2017, Appellants filed in this lawsuit against the District and Respondents Governor Michael Parson and Attorney General Eric Schmitt[13] in their respective official capacities, shortly after the District's April 2017 property tax increase was approved by the District's voters and the voters of only the Annexed Area of Crestwood. Appellants sought a declaratory judgment that §§ 72.418 and 321.322.3 are unconstitutional special laws, that the District's 2012 and 2017 property tax increase elections violated the due process rights of Roby and Hoeing, and violated the Hancock Amendment, that § 72.418 violated the constitutional municipal property tax cap, and that § 72.418 created an unfunded mandate. Appellants also sought an order enjoining enforcement of these statutes and for an award of their costs and attorneys' fees for the Hancock Amendment violation. The trial court denied Appellants' motion for summary judgment and granted Respondents' motion for judgment on the pleadings, finding that §§ 72.418 and 321.322.3 did not violate the aforementioned constitutional provisions. Appellants timely filed a notice of appeal to this Court.

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12 House Bill 167 (1985), House Bill 861 (1986), Senate Bill 725 (1988), House Bills 1395 & 1448 (1990), Senate Bill 34 (1991), Senate Bills 160 & 82 (1999) House Bill 58 & Senate Bill 210 (2005), House Bills 307 & 336 (2013), and Senate Bill 672 (2014).

13 This lawsuit was initially filed against Governor Eric Greitens and Attorney General Joshua Hawley, in their respective official capacities. Respondents Parson and Schmitt are substituted in lieu thereof by operation of Rule 52.13(d).

POINTS RELIED ON

I. The trial court erred in granting judgment for Respondents, ruling that § 72.418, RSMo. is not a special law because it violates Mo. Const. art. III, § 40(30) in that its real effect is to apply only to cities in St. Louis County and their inhabitants in perpetuity and subject them to a different set of statutes than those governing similarly situated cities in other counties.

City of DeSoto v. Nixon, 476 S.W.3d 282 (Mo. banc 2016)

City of Springfield v. Sprint Spectrum, L.P., 203 S.W.3d 177 (Mo. banc 2006)

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

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

II. The trial court erred in granting judgment for Respondents, ruling that § 72.418, RSMo. is not a special law because it violates Mo. Const. art. III, § 40(21) in that it is a special law that regulates the affairs of Crestwood by preventing it from enforcing its ordinances in part of the City and by inhibiting its ability to provide or negotiate for fire protection services.

Mo. Const. art. III, § 40(21)

§ 72.418, RSMo.

III. The trial court erred in granting judgment for Respondents, ruling that § 321.322.3 is not a special law because it violates Mo. Const. art. III, § 40(30) in that its real effect is to apply only to cities in St. Louis County and their inhabitants in perpetuity and subject them to a different set of statutes than those governing similarly situated cities in other counties.

Jefferson County Fire Prot. Districts Ass'n. v. Blunt,
205 S.W.3d 866 (Mo. banc 2006)

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

South Metro. Fire Prot. Dist. v. City of Lee's Summit,
278 S.W.3d 659 (Mo. banc 2009)

State ex rel. City of Blue Springs v. Rice, 853 S.W.2d 918 (Mo. banc 1993)

IV. The trial court erred in granting judgment for Respondents, ruling that § 72.418 does not violate Mo. Const. art. X, § 11 because this statute produces a tax rate by a municipality in excess of $1.00 on each hundred dollars of assessed valuation in a portion of the City because the annual payment mandated by § 72.418 exceeds $1.00 per $100 of assessed valuation without a two-third vote of the qualified electors, violating the clear purpose of art. X, § 11.

Ehlmann v. Nixon, 323 S.W.3d 787 (Mo. banc 2010)

School Dist. of Kansas City v. State, 317 S.W.3d 599 (Mo. banc 2010)

Three Rivers Junior Coll. Dist. of Poplar Bluff v. Statler, 421 S.W.2d 235 (Mo. banc 1967)

Zweig v. Metro. St. Louis Sewer Dist., 412 S.W.3d 223 (Mo. banc 2013)

V. The trial court erred in granting judgment for Respondents, ruling that § 72.418 does not violate Mo. Const. art. I, § 10 because Appellants Roby and Hoeing are deprived of property without due process of law, in that their tax dollars are diverted to another political subdivision without an opportunity for them to voice their objections, block such transfer, or hold the elected officials receiving such funds accountable.

Exxon Corp. v. Wisconsin Dept. of Revenue, 447 U.S. 207 (1980)

Garden of Eden Drainage Dist. v. Bartlett Tr. Co., 50 S.W.2d 627 (Mo. 1932)

Lebeau v. Commissioners of Franklin County, 422 S.W.3d 284 (Mo. banc 2014)

Mobil-Teria Catering Co., Inc. v. Spradling, 576 S.W.2d 282 (Mo. banc 1978)

VI. The trial court erred in granting judgment for Respondents, ruling that the Affton Fire Protection District's tax increases in 2012 and 2017 did not violate Mo. Const. art. X, §§ 16 and 22 because Roby and Hoeing suffer an increased tax burden without the ability to participate in such elections, in that a tax increase by the Affton Fire Protection District necessarily increases taxes on residents of Crestwood due to the operation of § 72.418.

City of Hazelwood v. Peterson, 48 S.W.3d 36 (Mo. banc 2001)

Rohrer v. Emmons, 289 S.W.3d 600 (Mo. App. E.D. 2009)

Beatty v. Metro. St. Louis Sewer Dist., 867 S.W.2d 217 (Mo. banc 1993)

Zweig v. Metro. St. Louis Sewer Dist., 412 S.W.3d 223 (Mo. banc 2013)

VII. The trial court erred in granting judgment for Respondents, ruling that § 72.418 does not violate Mo. Const. art. X, §§ 16 and 21 because the statute mandates that the City of Crestwood undertake a new and increased level of activity by financing the operations of the Affton Fire Protection District in that the City is required to both pay for its own fire department and to subsidize fire protection services in an adjacent political subdivision without an appropriation from the General Assembly.

Purler-Cannon-Schulte, Inc. v. City of St. Charles, 146 S.W.3d 31 (Mo. App. E.D. 2004)

Mo. Const. art. X, § 16

Mo. Const. art. X, § 22

ARGUMENT

The people of Crestwood are stuck. Due to a statute (§ 72.418) applicable in only one county of the state, affecting only a few discrete areas of such county, the taxpayers of Crestwood are annually indebted to the neighboring Affton Fire Protection District in an amount in excess of $500,000.00. This amount will likely grow each year with no recourse for Crestwood's taxpayers to protest or object. It is beyond dispute that § 72.418 is structured so as to ensure that it will never apply anywhere else in the state, and that it will always apply to the people of Crestwood. A different statute (§ 321.322) applicable to the rest of the state governs the relationship between fire protection districts and cities post-annexation, and this statute permits taxpayers in all other counties to avoid the predicament in which Crestwood's taxpayers now find themselves.

The combined effect of §§ 72.418 and 321.322.3 makes plain that these statutes are designed to treat cities in St. Louis County differently than, and special from, cities in any other county in the state. Crestwood should be allowed the same right, provided by § 321.322.1, to determine whether fire protection service provided by a fire protection district is best for its citizens. Such right is enjoyed by cities in all of the other counties of Missouri. After more than twenty years of mandated payments, Crestwood should not be shackled throughout time to subsidize the operations of a fire protection district, solely for the benefit of that fire protection district, when it is no longer in the best interests of its citizens. There is no reason why only cities in St. Louis County should be so burdened and fire protection districts in St. Louis County should enjoy protections not afforded to fire protection districts in every other county.

Unless they are granted relief by this Court, the people of Crestwood are without a remedy from the operation of these statutes that the fire protection districts claim will perpetually indebt Crestwood to the District. To repeal these statutes, the people of Crestwood would have to muster a statewide coalition in the General Assembly to amend a set of laws which only affect small portions of St. Louis County and which could *never* apply in any other county in this state. A legislative remedy is clearly illusory.

This is the precise evil which the Missouri Constitution's prohibition on special laws was designed to prevent. *See* Mo. Const. art. III, § 40(30). Prior to 1859, when special legislation predominated in the Missouri General Assembly:

> legislators spent their time engaged in the practice of logrolling, whereby a legislator could count on other legislators to vote for his special legislation in return for him voting for their special legislation. Any legislator who dared challenge a particular piece of special legislation risked ostracism. And *since the legislation did not apply to any other legislators' districts, the other legislators did not consider the merits of the legislation*. Indeed, an individual legislator during that time period had exclusive powers with regard to every matter of legislation that affected his county and the people in it. The prevalence of special legislation led to extremely powerful lobbyists and sometimes outright corruption.

Jefferson County Fire Prot. Districts Ass'n. v. Blunt, 205 S.W.3d 866, 869 (Mo. banc 2006) (internal citations omitted). Emphasis added. Accordingly, this Court must strike down these statutes – §§ 72.418.2 and 321.322.3, RSMo. – as unconstitutional special laws, because they make an unnatural distinction between cities within St. Louis County and all other cities in this state, and provide no ability for classifications to change.

Much of this Court's jurisprudence on the topic of special laws has focused on the *tools* employed by the General Assembly to draw distinctions between classes, rather than the *act of discriminating* between similarly situated cities: whether such laws are based on "open-ended" characteristics or immutable characteristics, population ranges and floors, geographic features, or historical dates, etc. The statutes at issue herein are unquestionably special laws, regardless of the test applied, because they create an unnatural distinction between cities in St. Louis County and all other cities, without any justification, and without regard for the Missouri Constitution's mandate that only four classes of cities and four classes of counties shall exist, with each class possessing the same powers and each subject to the same restrictions. *See* Mo. Const. art. VI, §§ 8, 15.

The people of Crestwood are entitled to the right established by art. III, § 40(30) to be free from the undemocratic and arbitrary mechanism designed by the General Assembly to thwart the constitutional prohibition on special laws that obstructs the ability of Crestwood's residents to make decisions regarding their own self-governance. Only

municipalities in St. Louis County are required to tolerate the restrictions on their tax dollars caused by §§ 72.418.2 and 321.322.3 and the residents of Crestwood must be liberated from these restrictions.

The appropriate test for whether a statute is special or general must consider whether the classification of a city/person/entity could realistically change under the statutory classification scheme. Applied to §§ 72.418.2 and 321.322.3, a court should consider whether it is truly possible for a city outside St. Louis County to become subject to these statutes in the future, and whether it is truly possible for a city presently subject to these statutes to be removed from their ambit and thereby become subject to § 321.322.1, the statute applicable to the remainder of the state of Missouri.

Here, one law (§ 72.418.2) applies to cities within St. Louis County. Another law (§ 321.322.1) applies to all other cities. There is no plausible scenario under which a city in St. Louis County could change classifications to become subject to § 321.322.1. There is no plausible scenario under which a city outside St. Louis County could become subject to §§ 72.418.2 and 321.322.3. Because these statutes treat cities in St. Louis County differently than similarly situated cities elsewhere, with no ability for cities to change classifications, these are unconstitutional special laws and must be struck by this Court.

I. The trial court erred in granting judgment for Respondents, ruling that § 72.418, RSMo. is not a special law because it violates Mo. Const. art. III, § 40(30) in that its real effect is to apply only to cities in St. Louis County and their inhabitants in perpetuity and subject them to a different set of statutes than those governing similarly situated cities in other counties.

Error Preserved for Appellate Review

Appellants preserved this issue for appellate review, in that the trial court granted Respondents' motion for judgment on the pleadings, and denied Appellants' motion for summary judgment, finding that § 72.418, RSMo. was not an unconstitutional special law. Appellants timely appealed the trial court's judgment.

Standard of Review

The trial court entered judgment granting Respondents' motion for judgment on the pleadings and denying Appellants' motion for summary judgment as to Count I of Appellants' First Amended Petition. "Because a judgment on the pleadings addresses an issue of law, our review is *de novo* and without deference to the circuit court's ruling." State ex rel. Kansas City Symphony v. State, 311 S.W.3d 272, 274 (Mo. App. W.D. 2010). "In reviewing the grant of a motion for judgment on the pleadings, this Court must decide 'whether the moving party is entitled to judgment as a matter of law on the face of the pleadings.' 'The well-pleaded facts of the non-moving party's pleading are treated as admitted for purposes of the motion.' 'A grant of judgment on the pleadings will be affirmed only 'if the facts pleaded by the petitioner, together with the benefit of all reasonable inferences drawn therefrom, show that petitioner could not prevail under any legal theory.'" Emerson Elec. Co. v. Marsh & McLennan Companies, 362 S.W.3d 7, 12 (Mo. banc 2012) (internal citations omitted). Review of the trial court's decision denying Appellants' motion for summary judgment is "essentially de novo, as the propriety of summary judgment is an issue of law." Stanley v. City of Independence, 995 S.W.2d 485, 486 (Mo. banc 1999).

Argument

The trial court erroneously determined that § 72.418.2 is a general law and not a special law in violation of Mo. Const. art. III, § 40(30) because it establishes one set of

laws for cities within St. Louis County and another set of laws for cities in all other counties. Because a general law could apply to cities in St. Louis County, there is no substantial justification for § 72.418, and it is unconstitutional. The trial court's judgment granting judgment on the pleadings to Respondents and denying summary judgment in favor of Appellants as to Count I of Appellants' First Amended Petition should be reversed and § 72.418 should be enjoined by this Court.

A. Special Law Standard

Article III, § 40(30) of the Missouri Constitution prohibits the General Assembly from enacting a special law "where a general law can be made applicable…." A "'special law is a law that includes less than all who are similarly situated. A law is not special if it applies to all of a given class alike and the classification is made on a reasonable basis.'" City of St. Louis v. State, 382 S.W.3d 905, 914 n.9 (Mo. banc 2012) (internal citations omitted). The prohibition on special laws is long-standing. In 1895, this Court stated that:

> Every one has a right to demand that he be governed by general rules, and a special statute which, without his consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free government.

State v. Julow, 31 S.W. 781, 783 (Mo. banc 1895) (internal citations omitted). "The legislature may legislate in regard to a class of persons, but they cannot take what may be termed a natural class of persons, split that class in two, and then arbitrarily designate the dissevered fractions of the original unit as two classes, and enact different rules for the government of each." Id. (internal citations omitted). "'The vice in special laws is that they do not embrace all of the class to which they are naturally related.' Thus, 'the question in every case is whether any appropriate object is excluded to which the law, but for its limitations, would apply.'" City of Springfield v. Sprint Spectrum, L.P., 203 S.W.3d 177, 184 (Mo. banc 2006) (internal citations omitted).

1. Open-Ended / Immutable Characteristics

"Whether a statute is, prima facie, a special law depends on whether the classification it makes is 'open-ended.' Classifications based upon factors subject to

change (like population) may be open-ended and do not implicate the constitutional prohibition. 'Classifications based upon historical facts, geography, or constitutional status focus on immutable characteristics and are therefore facially special laws.'" Tillis v. City of Branson, 945 S.W.2d 447, 449 (Mo. banc 1997) (internal citations omitted). However, this "Court must look to the real effect of statutory criteria rather than to their nominal generality to determine whether the law is a general or special one." City of DeSoto v. Nixon, 476 S.W.3d 282, 288 n. 4 (Mo. banc 2016). "'If in fact the act is by its terms or '*in its practical operation*, it can only apply to particular persons or things of a class, then it will be a special or local law, *however carefully its character may be concealed by form of words*.'" McKaig v. Kansas City, 256 S.W.2d 815, 817 (Mo. banc 1953) (internal citations omitted). Emphasis added.

2. Criteria Must Be Considered Collectively.

In City of DeSoto, this Court stated that it:

> rejects the State's suggestion that this Court should consider the limiting effects of each of the six listed criteria set out in section 321.322.4 (two of which are population-based and four of which are based on other factors) individually, so that if any other city reasonably will come within each criterion, separately considered, then the statute would not be a special law, even though no other city reasonably will come within all six criteria considered together. As the six statutory criteria are applied as a whole in determining whether section 321.322.4 applies to a particular city, this Court *considers them as a whole* in determining whether the six criteria, as a practical matter, are drawn so narrowly that they will not apply to another city and 'the only apparent reason for the narrow range is to target a particular political subdivision and exclude all others.'

476 S.W.3d at 284-285 (internal citations omitted). Emphasis added. While criteria may appear open-ended, the court must evaluate *all* of the criteria limiting the application of a statute to one sub-class *collectively* in evaluating whether the statute is a special law.

B. Trial Court's Judgment

The trial court's judgment determined that § 72.418, which, pursuant to § 72.401, RSMo., applies only to cities within a "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," was based on open-ended characteristics and was therefore constitutional. D38 p. 3; App A5. The trial court asserted that, if read in isolation, nothing in § 72.418 limited its applicability to St. Louis County, and that it was, therefore, a general law. D38 p. 3; App A5. Even if read within the context of the Boundary Commission Act, the trial court held that it was open-ended because "there is no express limitation on which county could establish such a [boundary] commission." D38 p. 4; App A6. Further, the trial court considered the adoption of a charter to be an open-ended characteristic. D38 p. 4; App A6. Finally, the trial court held that "any and every county" could eventually have more than fifty municipalities established therein. D38 p. 5; App A7.

By examining each of these criteria individually, the trial court ignored this Court's mandate in DeSoto to consider these criteria collectively to determine whether the statute is special or general. Further, the trial court's decision failed to consider the "real effect of statutory criteria rather than … their nominal generality" in evaluating whether the law is special or general. DeSoto, 476 S.W.3d at 288, n. 4. It is indisputable that, when considered collectively, these statutes lock cities in St. Louis County into the application of § 72.418 and preclude cities in any other county from ever becoming subject to § 72.418. Because the criteria in the statute are not subject to change, though they appear nominally open-ended, § 72.418 is a special law.

C. The Prospective Nature of *Jefferson County* Does Not Affect § 72.418.

The trial court's judgment states:

> the City's real challenge to § 72.418.2 is based on the premise that the new test articulated in Jefferson County Fire Protection Districts v. Blunt, or that test as revised in City of Normandy v. Greitens, applies here. But both cases expressly reject that proposition, declaring that the General Assembly will not be held to have violated the 'special law' provision while acting consistent with the pre-Jefferson County Fire Protection Districts holdings. Section 72.418.2 must be evaluated under the law that permitted the use of open-ended characteristics even when they left only one county within the scope of a statute.

D38 p. 5; App A7 (internal citations omitted). The trial court's rationale is factually and legally incorrect. In Jefferson County, 205 S.W.3d at 868, this Court invalidated a statute which prohibited fire districts in a first class county with between 198,000 and 199,200 inhabitants from adopting home construction codes. Id. at 867. The population range made the statute (§ 321.222.7, RSMo.) only applicable to Jefferson County. Id. at 871. Prior to Jefferson County, a population range was generally considered "open-ended in that others may fall into the classification." Id. at 870. This Court stated in Jefferson County that:

> The rationale for holding that population classifications are open-ended fails, however, where the classification is so narrow that as a practical matter others could not fall into that classification. Where a classification is this narrow, the presumption that a population-based classification is open-ended, and therefore a general law, would contravene the purpose behind the constitutional prohibition against special legislation.… The presumption that a population-based classification is constitutional is overcome if: (1) a statute contains a population classification that includes only one political subdivision, (2) other political subdivisions are similar in size to the targeted political subdivision, yet are not included, and (3) the population range is so narrow that the only apparent reason for the narrow range is to target a particular political subdivision and to exclude all others. If all three circumstances exist, the law is no longer presumed to be general, but is presumed to be a special law, requiring those defending it to show substantial justification for the classification.

Id. However, this Court stated that "[b]ecause of the General Assembly's possible reliance on previous cases not articulating this presumption, only statutes passed after the date of this opinion are subject to this analysis." Id. at 871. Statutes enacted prior to November 21, 2006, are not subject to the above analysis. Aside from this test for population-based classifications, no other portion of the holding in Jefferson County is limited to statutes enacted after 2006.

Section § 72.401, which limits the application § 72.418 to cities within St. Louis County, does not employ a population-based classification. Rather, it limits § 72.418 to apply only to cities within a county with a charter form of government in which fifty or more cities have been established and in which the county's governing body has adopted

an ordinance establishing a boundary commission. The criteria in § 72.401 limiting the application of § 72.418 can be evaluated without regard to the distinction in pre- and post-Jefferson County cases because §§ 72.401 and 72.418 do not use a population-based classification. Furthermore, this Court made clear in DeSoto that "Jefferson County was not a break with prior law, however, for earlier cases similarly had held that this Court must look to the *real effect of statutory criteria rather than to their nominal generality* to determine whether the law is a general or special one." 476 S.W.3d at 288, n. 4. Emphasis added. Therefore, it is immaterial that the Jefferson County test for population-based classifications applied only prospectively. The trial court's determination that its ruling must be based on pre-Jefferson County jurisprudence was misplaced.

D. The Boundary Commission Act, Including § 72.418, Can Only Apply to Cities in St. Louis County.

There is no dispute that § 72.418 presently applies only to cities in St. Louis County, since St. Louis County is the only first class charter county in which more than fifty municipalities have been established, and is, accordingly, the only county that has (or is capable of) establishing a boundary commission by ordinance. While Respondents may assert that cities in other counties could, at some point in the future, become subject to § 72.418, or that cities in St. Louis County may someday be removed from the ambit of § 72.418, a careful review of the facts and applicable law clearly establishes that § 72.418 will apply to cities within St. Louis County, and *only* cities in St. Louis County, in perpetuity.

For a city to become subject to § 72.418, it must be geographically located in a county: (1) with a charter form of government; (2) in which fifty or more municipalities have been established; and (3) the county's governing body must have adopted an ordinance establishing a boundary commission. *See* § 72.401, RSMo. Only fourteen of Missouri's 114 counties are of the first classification. Only four counties have adopted charters. St. Louis County has nearly ninety cities. D2 p. 7. In no other county have more than twenty-three municipalities been established. D2 p. 7. Since 1992, only thirteen municipalities have been have been incorporated *in the entire state*. D10 p. 13.

There is simply no possibility that any city outside St. Louis County will meet all of the criteria necessary for § 72.418 to apply to it. While it is conceivable that a county could become first class and adopt a charter, or that an existing first class county[14] could adopt a charter, it is entirely impossible for any county to do so *and* have more than fifty cities established therein for the foreseeable future. Any speculation as to whether some county could, at some remote date in the future, become subject to §§ 72.400 through 72.430 is pure conjecture divorced from any analysis of the present state of affairs in Missouri, and its recent history. The remote possibility that all of the events necessary for § 72.418 to apply outside of St. Louis County might occur at some undetermined date in the future is insufficient for this Court to conclude that § 72.418 is a general law. In City of Normandy v. Greitens, 518 S.W.3d 183, 195, n. 15 (Mo. banc 2017), the State argued that a statute was open-ended (and therefore not a special law) because St. Louis County could "replac[e] their charter form of government," and/or "a county's population can change by adjusting the county boundaries by statute.… [But, this Court noted that the State's] argument fails to account for this Court's ruling in City of DeSoto, which looks to what, '*as a practical matter*, is *likely*' to happen in 'the *foreseeable* future' and not merely a 'possible' outcome." (internal citations omitted). Emphasis in original.

The fifty-municipality threshold is an arbitrary threshold designed to prevent any city outside of St. Louis County from suffering the burdens of § 72.418 and the Boundary Commission Act in general. The General Assembly could have simply granted authority for all counties (or all charter counties) to adopt a boundary commission. Instead, the General Assembly concocted new classifications based on a county's enactment of an ordinance and the number of cities in a county. The General Assembly then subjects cities in the different classifications to differing regulations. Because it is impossible for cities outside St. Louis County to become subject to the Boundary Commission Act, the

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[14] In addition to being first class for two years, Mo. Const. art. VI, § 18(a) also provides that a county with a population over 85,000 may adopt a charter, even if it is not first class. However, as of 2010, Newton County had the highest population of non-first class counties with 58,845 inhabitants. Its population would need to increase by roughly 30% to be eligible to adopt a charter.

criteria in § 72.401 limiting § 72.418 to cities within a charter county with fifty or more municipalities and in which the county has adopted a boundary commission ordinance are not open-ended, and § 72.418 is a special law.

E. Even if Other Counties Could Adopt a Boundary Commission Act, It Would Be Void and Powerless.

The trial court's judgment asserts that any county could adopt a boundary commission ordinance. D38 p. 4; App A6. This is false. The fifty-municipality threshold makes it practically impossible for another county to meet the criteria. However, even if it were true, it would not benefit Respondents because even if another county adopted a boundary commission ordinance, § 72.418 would not apply within such county. The trial court ignored this Court's mandate in DeSoto that it must examine whether a statute "'by its terms or '*in its practical operation* … can only apply to particular persons or things of a class, [in which case] it will be a special or local law, however carefully its character may be concealed by form of words.'" 476 S.W.3d at 288, n. 4 (internal citations omitted). Emphasis in original.

1. If Another County Adopted a Boundary Commission Ordinance, it Would Conflict with State Law.

The Boundary Commission Act is the exclusive method for "boundary changes" where the Act applies. "Boundary changes" includes "annexation, consolidation, incorporation," and other transfers of jurisdiction by municipalities. *See* § 72.400(2), RSMo. For all other counties aside from St. Louis County, the General Assembly has enacted a comprehensive scheme governing annexations, consolidations, and incorporations which apply regardless of whether a county has a boundary commission.

Non-charter counties can only act pursuant to authority expressly granted to them, and the General Assembly has not granted them authority to adopt boundary commissions. These counties "must have legal authority to act. A county commission is given authority to 'manage all county business as prescribed by law,' … and, aside from the fiscal affairs of the county, it has only such powers as the legislature sees fit to delegate. A county commission is not a general agent of the county or the state. Its powers are granted, limited and defined by law." Greene County v. Pennel, 992 S.W.2d

258, 262 (Mo. App. S.D. 1999) (internal citations omitted). In the absence of a statute permitting counties in the four constitutional classes to establish a boundary commission, no authority for such counties exists.

The annexation procedures in Chapter 71 govern cities in all other counties except those subject to the Boundary Commission Act. *See* 71.860, RSMo. The incorporation procedures in § 72.080 apply statewide except for incorporations within "any county with a charter form of government where fifty or more cities, towns and villages have been incorporated, an unincorporated city, town or other area of the state shall not be incorporated *except as provided in sections 72.400 to 72.420*." Emphasis added. The consolidation procedures in §§ 72.150 through 72.220, RSMo. apply statewide, except that "[a]ny cities, towns or villages within any county with a charter form of government where fifty or more cities, towns and villages have been incorporated shall consolidate pursuant to the provisions of section 72.420." *See* § 72.150.3, RSMo.

Even if a county adopted a boundary commission ordinance to govern boundary changes, such county would still remain subject to the aforementioned statutes governing annexations, incorporations, and consolidations. County ordinances cannot conflict with state law on the same subject. "[L]ocal ordinances regulating matters upon which there is a state law must be in harmony with the state on that subject." Borron v. Farrenkopf, 5 S.W.3d 618, 622 (Mo. App. W.D. 1999).

Even charter counties cannot enact an ordinance in conflict with the state laws governing annexation, incorporation and consolidation. "A county charter … also carries with it an implied grant of such powers as are reasonably necessary to the exercise of the powers granted, so long as the exercise of such powers does not ''invade the province of general legislation' involving public policy of the State as a whole.'" Barber v. Jackson County Ethics Comm'n., 935 S.W.2d 62, 66 (Mo. App. W.D. 1996). A charter county "remains a legal subdivision of the state. As such, it can only control '[m]atters of purely municipal, corporate concern …' and its actions 'must be in harmony with the general law where it touches upon matters of state policy.'" Missouri Bankers Ass'n., Inc. v. St. Louis County, 448 S.W.3d 267, 272 (Mo. banc 2014) (internal citations omitted).

Any county which established a boundary commission, other than a county with a charter form of government in which more than fifty municipalities have been established, would be enacting an ordinance that conflicts with state law and in excess of the county's authority. Furthermore, and most critically here, even if such county enacted a boundary commission ordinance, the cities in such county would not become subject to § 72.418 and would still be subject to § 321.322.1, RSMo., because § 321.322.1 applies throughout the state, except in counties with a population over 900,000, discussed in more detail, *infra*. Accordingly, the ability to enact a boundary commission ordinance, and to thereby become subject to § 72.418, is limited to St. Louis County.

2. If Another County Adopted a Boundary Commission Ordinance, Cities in Such County Would Not be Subject to § 72.418.

If the county council of Jefferson County passed an ordinance establishing a boundary commission, "boundary changes" would not be governed by such boundary commission, because annexations, consolidations, and incorporations would still be governed by state statutes addressing these matters. Since Jefferson County has less than fifty municipalities, the Boundary Commission Act would not apply and the state statutes would supersede a county ordinance purporting to govern boundary changes. The same is true of Jackson County and St. Charles County, which each have only eighteen cities. And Jefferson County (or Jackson or St. Charles), with far less than 900,000 inhabitants, would remain subject to § 321.322.1, RSMo.

Regardless, the trial court's determination that any county could adopt a boundary commission ordinance misses the larger point. Even if another county *could* adopt a boundary commission ordinance, § 72.418 would *still not apply* to the cities therein. Because § 72.401 limits the scope of § 72.400 through 72.430 to cities within "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," § 72.418 would only apply if *all* of these criteria have been met. The legislature has concocted a scheme whereby the enactment of a boundary

commission by St. Louis County triggers the application of § 72.418, whereas the same action by another county *would not* trigger the application of § 72.418.

If the General Assembly had truly intended for the adoption of a Boundary Commission to be voluntary and open to other counties, it would not have limited the application of §§ 72.400 through 72.430 to those counties in which fifty or more municipalities have been established. The General Assembly would simply have given county officials the discretion to determine if circumstances warrant the establishment of a boundary commission. The fifty-municipality threshold exists solely to preclude cities in other counties from becoming subject to § 72.418 and the Boundary Commission Act.

3. St. Louis County is Blocked from Repealing its Boundary Commission Ordinance.

While, on its face, it may appear that whether St. Louis County has a boundary commission is a voluntary choice that could be undone, any discretion on the part of St. Louis County as to whether its municipalities are subject to §§ 72.400 through 72.430 is illusory. The state statutes regarding consolidation (§ 72.150) and incorporation (§ 72.080) would continue to exclude St. Louis County, even if it repealed its boundary commission ordinance.

Further, if St. Louis County repealed its boundary commission ordinance, § 321.322.3 would still exclude cities in St. Louis County from the remainder of § 321.322. The cities and fire protection districts in St. Louis County would be in a legislative "no man's land," lacking a regulatory framework to govern their interactions post-annexation. While repealing the boundary commission ordinance might appear to set the cities in St. Louis County free from § 72.418, the General Assembly has clearly road-blocked St. Louis County from doing so. As a practical matter, the cities in St. Louis County are stuck with § 72.418 in perpetuity.

4. The Factors Subjecting Cities in St. Louis County to § 72.418 are Not Open-Ended.

Though § 72.418 may appear nominally open-ended, its real effect is indisputably permanent and immutable. As a practical matter, it could only ever be applied to cities in St. Louis County. In DeSoto, 476 S.W.3d at 284, the court invalidated § 321.322.4,

RSMo. as a special law. Section 321.322.4 excluded from the operation of § 321.322 any third class city operating a fire department that has between 6,000 and 7,000 inhabitants[15] and is "located in any county with a charter form of government and with more than two hundred thousand but fewer than three hundred fifty thousand inhabitants, and is entirely surrounded by a single fire protection district." Id. at 289. Only DeSoto met all of these criteria. Id. at 288. The State argued that "the criteria in the statute are open-ended because they are all subject to change through population growth or political decisions." Id. at 286.

In holding that § 321.322.4, RSMo. was a special law, this Court noted that "three different entities – a city, a county, and a fire protection district – would all have to decide to make changes in precisely the manner required by the statute for subsection 4 to apply, even assuming the population and other requirements somehow could be met." Id. at 289. A "city has the least control over the type of county in which it is located; whether a county has a charter form of government is entirely outside the power of any individual city located within. A vote by all members of the county, not city, decides whether a county will adopt or maintain a charter form of government. Mo. Const. art. VI, § 18(a). Assuming a city or town meets all of these requirements, it still must satisfy both the city and county population requirements." Id., n. 8.

As in DeSoto, the actions required for Crestwood to escape § 72.418 are entirely out of its hands. The St. Louis County Council would need to repeal its boundary commission ordinance (*See* Art. II, § 2.080 of the 1979 St. Louis County Charter), the citizens of St. Louis County would need to renounce their charter (necessitating a countywide election under Mo. Const. art. VI, § 18(k)), and/or forty or more municipalities would need to spontaneously dissolve or merge with neighboring municipalities, which would also require elections in all affected municipalities. *See* §§ 77.700, 79.490, RSMo. Even if St. Louis County repealed its boundary commission ordinance, or forty cities dissolved, *Crestwood would still be excluded from § 321.322,*

[15] It is noteworthy that many of this Court's decisions regarding special laws involve legislative carve-outs to protect individual fire protection districts.

RSMo., because § 321.322.3 excludes cities within first class charter counties with more than 900,000 inhabitants.

The statutory criteria limiting § 72.418 to cities within St. Louis County are not "based upon factors subject to change" and are therefore not open-ended characteristics. Tillis v. City of Branson, 945 S.W.2d at 449.

F. The General Assembly Did Not Comply With Art. III, § 42 When It Enacted the Boundary Commission Act.

"[S]pecial 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." Normandy, 518 S.W.3d at 188. However, this Court need not even reach the issue of whether § 72.418 is substantially justified, because the General Assembly did not comply with Mo. Const. art. III, § 42, which provides that:

> No local or special law shall be passed *unless a notice*, setting forth the intention to apply therefor and the substance of the contemplated law, *shall have been published in the locality where the matter or thing to be affected is situated* at least thirty days prior to the introduction of the bill into the general assembly and in the manner provided by law. Proof of publication shall be filed with the general assembly before the act shall be passed and *the notice shall be recited in the act*.

Emphasis added. Here, it is beyond dispute that all of the bills enacting and amending §§ 72.400 and 72.401 did not recite the notice required by art. III, § 42. D10 p. 10; D27 pgs. 22-23. Senate Bill 256 (1993), enacting § 72.418.2 and .3, did not recite such notice. D10 p. 10; D27 p. 23; App A74-A78.

Senate Bill 256 (1993), which enacted most of the language in § 72.418.2 at issue in this lawsuit, repealed seven sections of Chapter 321, RSMo. and added subsections 2 and 3 to § 72.418. 1993 Mo. Laws, pgs. 924-928; App A74-A78. By placing § 72.418.2 and .3 within the Boundary Commission Act, the General Assembly ensured that it would apply only to St. Louis County. The other section amended by Senate Bill 256, § 321.300, only applied to Franklin County.[16] Id. at 925-926; App A75-A76.

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[16] The amendment to § 321.300 applied only "in a noncharter county of the first classification with a population of less than one hundred thousand which adjoins

Clearly, Senate Bill 256 was not general legislation applicable to the state as a whole, but was a special law, part of which applied only within St. Louis County (with the remainder applying only within Franklin County). Therefore, art. III, § 42 mandated that notice be provided in St. Louis County and Franklin County and that Senate Bill 256 recite that such notice was given. No such notice was given, and none was recited in Senate Bill 256. Accordingly, the enactment of § 72.418 violated art. III, § 42 and is unconstitutional. None of the bills amending § 72.418 complied with art. III, § 42 and are therefore unconstitutional. This is a substantive defect within the text of the bills enacting and amending § 72.418, and the Boundary Commission Act in general.

The Missouri Constitution prescribes mandatory text for the General Assembly to include to enact special legislation targeting a particular municipality, when the General Assembly determines that doing so is justified. It must provide notice to the targeted municipality and recite such notice in the bill. The General Assembly did not do so here. Therefore, the bills enacting and amending § 72.418 and the Boundary Commission Act are unconstitutional.

G. There Is No Substantial Justification (or Rational Basis) for § 72.418.

Even if this Court reaches the issue of whether there was a substantial justification for the enactment of § 72.418, the statute cannot survive because it lacks a substantial justification, or even a rational basis. "[I]f a law is not open-ended, instead of presuming that it is constitutional, the presumption is that it is unconstitutional." O'Reilly v. City of Hazelwood, 850 S.W.2d 96, 99 (Mo. banc 1993). "The burden, therefore, shifts to … the party defending the statute, to show that it is constitutional. In order to meet this standard, the mere existence of a rational or reasonable basis for the classification is insufficient." Springfield v. Sprint Spectrum, 203 S.W.3d at 186. There is no possible substantial justification for treating cities in counties that have established boundary commissions differently than cities in all other counties.

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any county of the first classification with a population of nine hundred thousand or more." Only Franklin County met these criteria in 1993.

This Court has previously rejected the premise that any unusual annexation activity would form a substantial justification for treating cities in St. Louis County differently. In O'Reilly, the Supreme Court found that a substantial justification was not shown for a prior version of the Boundary Commission Act where the respondents offered evidence "that St. Louis County reasonably needed a boundary commission to administer municipal annexations. The respondents also elicited testimony that St. Louis County differs greatly from other counties, in terms of annexation issues." 850 S.W.2d at 99. "[T]he evidence showed that suburban development did not stop at the St. Louis County border, but rather extended, at an increasing rate, to St. Charles County and Jefferson County. In addition, respondents did not demonstrate a substantial justification for excluding other counties from choosing to have a boundary commission. Thus, there was no substantial justification for § 72.400 RSMo Supp.1991 not being open-ended." Id.

While the criteria used by the General Assembly to discriminate against cities in St. Louis County have changed since O'Reilly, the disparate treatment of cities within St. Louis County has not. When O'Reilly was decided, the Boundary Commission Act applied to cities within "any first class county with a charter form of government which adjoins a city not within a county." While that formulation is no longer in the statute, any unusual annexation activity is no more of a substantial justification for failure to enact a general law today than when O'Reilly was decided. The difficulty of providing service to populated unincorporated areas is certainly as much of an issue in Jefferson County and St. Charles County as it is in St. Louis County, where 72% (Jefferson) and 26% (St. Charles) of these counties' populations[17] reside in unincorporated areas. D28 p. 18. This Court stated in O'Reilly that "respondents did not *demonstrate a substantial justification for excluding other counties from choosing to have a boundary commission*. Thus, there was no substantial justification for § 72.400 RSMo Supp.1991 not being open-ended." Id.

[17] Respondents noted in the trial court that in Jefferson County, 60,042 resided in incorporated areas in 2010, while in St. Charles, 265,969 resided in incorporated areas. Census data shows the 2010 total populations of Jefferson County and St. Charles as 218,733 and 360,485, respectively.

Emphasis Added. It is not sufficient to simply argue that St. Louis County is unique and that the Boundary Commission Act is tailored to the county's uniqueness. No two counties are exactly alike and any county could claim to be entitled to special treatment due to its unique history. That is not the legal standard for the enactment of a special law. Respondents must show that a general law *could not be applicable*, and it was their burden to so demonstrate. There is no substantial justification for subjecting cities in St. Louis County to § 72.418 *while excluding the other charter counties*. There is no substantial justification as to why the adoption of a boundary commission by Jackson, Jefferson, and/or Jackson Counties should not trigger the application of § 72.418, regardless of how many cities are established therein.

As the Boundary Commission Act applies only within St. Louis County, and § 72.418 impacts only small portions of St. Louis County, it clearly is not a matter of general statewide policy. No explanation is offered by either the trial court or Respondents as to why § 72.418 is necessary, or why § 321.322.1, the general law applicable to the rest of the state, could not apply in St. Louis County, regardless of whether it has adopted a boundary commission.

The Boundary Commission Act existed for some time prior to the enactment of § 72.418, and could certainly continue its existence if § 72.418 were struck from the statutes. Whatever interest the District may claim to assert that § 72.418 is necessary to protect could be equally asserted by any other fire protection district in the state. If anything, fire protection districts in St. Louis County are *more insulated* from the adverse effects of annexation under the Boundary Commission Act, even if § 72.418 were to be struck. Annexation is *far more difficult* under the Boundary Commission Act for municipalities, which must present their annexation proposals to the commission under § 72.403, RSMo. and face the possibility of arbitrary denial. If the Boundary Commission disapproves of a proposed annexation, no election on such annexation shall be held. *See* § 72.405.2, RSMo. Separate majorities in the annexing city and the unincorporated area must approve the annexation. *See* § 72.407.1(2), RSMo. Whether a boundary commission exists has no rational relationship with whether § 72.418 or § 321.322 applies.

The General Assembly itself has disproven any reason why § 72.418 is related to a boundary commission or why § 321.322.1 is incompatible with a boundary commission. In several instances, the General Assembly has excluded individual cities from § 321.322 to make them subject to § 72.418 instead, presumably to bow to political pressure from fire protection districts at the expense of municipal governments. *See* § 321.322.4, RSMo. (Supp. 2013) (originally enacted as subsection 5, purporting to apply § 72.418 to the City of DeSoto, only to be declared unconstitutional by this Court in 2016, DeSoto, 476 S.W.3d at 285); § 321.322.4, RSMo. (Supp. 2005) (repealed in 2014 by Senate Bill 672, applying § 72.418 to the City of Harrisonville in Cass County (a fourth class city with between 8,900 and 9,000 inhabitants surrounded by a fire protection district)). If § 72.418 could be applied to cities in counties with no boundary commission, then there is no rational basis for insisting that it be applied within counties with a boundary commission. The presence of a boundary commission within a county does not dictate that § 72.418 is necessary, or that § 321.322.1 could not coexist with a boundary commission. There is no substantial justification, and no rational basis, for applying § 72.418 to cities in St. Louis County and applying § 321.322 to all other cities.

For these reasons, § 72.418 is severable from the Boundary Commission Act. Under § 1.140, RSMo., the "provisions of every statute are severable." Only if "the valid provisions of the statute are so essentially and inseparably connected with, and so dependent upon, the void provision that it cannot be presumed the legislature would have enacted the valid provisions without the void one; or unless the court finds that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent." Id. Here, § 72.418 was not enacted until 1993, long after the remainder of the Boundary Commission Act was enacted. The presence of a boundary commission in a county in no way dictates that § 72.418 must be applied to municipal annexations. The operation of §§ 72.400 through 72.430 could continue to operate unimpeded if § 72.418 were struck.

H. A General Law Could be Made Applicable.

The question before this Court is therefore whether a general law could have been made applicable to address the concerns which § 72.418.2 and the Boundary Commission Act were intended to address. "Unconstitutionality of a special law is presumed … and there must be 'substantial justification' for excluding other political subdivisions. Two inquiries are appropriate: 'First, is the law a special or local law? Second, if so, is the vice that is sought to be corrected 'so unique to the persons, places, or things classified by the law that a law of general applicability could not achieve the same result?'" Treadway v. State, 988 S.W.2d 508, 511 (Mo. banc 1999) (internal citations omitted). The test, therefore, is whether a law of general applicability could not achieve the same result as making § 72.418.2 applicable only to cities in St. Louis County.

Missouri law permits the General Assembly to make different laws for the established classes of cities and counties. Article VI, § 8 of the Missouri Constitution establishes four classes of counties. Each class "shall be defined by general laws so that all counties within the same class shall possess the same powers and be subject to the same restrictions." Section 48.020, RSMo. divides the four classes of counties based on their populations and assessed valuations. Counties adopting a charter are essentially a fifth class of county, pursuant to Mo. Const. art. VI, § 18(a). Similar provisions exist with regard to cities, authorizing the General Assembly to create up to four classes of cities with the "powers of each class … defined by general laws so that all such municipal corporations of the same class shall possess the same powers and be subject to the same restrictions." *See* Mo. Const. art. VI, § 15. As with charter counties, charter cities are essentially another class of municipality. *See* Mo. Const. art. VI, § 19.

The General Assembly could have made a general law applicable to one class of counties, but that is not what the General Assembly did when it passed Senate Bill 256 (1993), enacting § 72.418.2. No other statute, aside from the Boundary Commission Act, classifies cities or counties based on the number of cities within a county. While there is clear authority for the General Assembly to create laws distinguishing among the classes of counties, or between charter and non-charter counties, there is no constitutional

support for distinguishing between cities based on the number of municipalities established in their county. Any law making such distinction is clearly a special law.

A general law could have applied within St. Charles, Jefferson, Jackson, and St. Louis County, but the General Assembly declined to make such a general law. Instead, it created different sets of rules to apply within the first class charter counties, with one rule for cities within St. Louis County (§ 72.418.2) and another for cities within St. Charles, Jefferson, Jackson counties, as well as the remaining non-charter counties (§ 321.322.1, RSMo.). There is no reason why § 321.322.1 – a general law applicable within all other counties except for St. Louis County – could not apply within St. Louis County, regardless of whether a county has created a boundary commission. Indeed, if a rational basis existed for applying § 72.418.2 within St. Louis County, there would be no rationale to not apply it to the other charter counties in lieu of § 321.322.1.

The specter of loss of tax revenue, which would supposedly be intolerable to fire protection districts in St. Louis County (but perfectly acceptable for all other fire protection districts in the state which are subject to § 321.322.1) due to municipal annexation does not justify treating cities in St. Louis County differently from the rest of the state. Fire protection districts in all other counties would feel the sting of lost revenue just as they would in St. Louis County. In City of Town & Country v. St. Louis County, et al., 657 S.W.2d 598, 606 (Mo. banc 1983), this Court stated:

> St. Louis County and municipalities located therein are not competing governmental entities, as the County has asserted. Rather, they are coexisting governmental entities that represent the residents therein. Their function is to serve the general interests of these residents, not to engage in competition for the right to collect revenues, provide services and the like. The legislature has provided the residents with the means to assert their preferences for such entities. Parties involved in annexation cases should note that the legislature's actions affirm the responsibility of government for the needs of those whom it serves, and not the needs of government in a continuing quest to serve itself.

Voters in every other county are presumed capable of making decisions about whether they are best served by a fire protection district or a municipal fire department without a

commission or a county-specific statute dictating the result. Yet residents in St. Louis County are denied this ability. Fire protection districts throughout the state are expected to conduct their financial affairs in light of the potential for municipal annexation. The General Assembly addressed these concerns for the rest of the state by enacting § 321.322.1, providing a drawdown period to ease the transition from fire protection district to municipal fire department. Respondents own no real or personal property within the Annexed Area, so there are no obstacles to the transfer of power contemplated by § 321.322.1. D10 p. 5. This Court has held that a fire protection district's "loss of tax revenue caused by … annexation of National Place will be offset by a decline in the need to provide fire protection services for that area, and by its ongoing ability to collect property taxes to pay past indebtedness." Battlefield Fire Prot. Dist. v. City of Springfield, 941 S.W.2d 491, 492 (Mo. banc 1997). Therefore, a fire protection district which loses tax revenue due to annexation "has no legally protectable interest." Id.

No special statute is needed in St. Louis County to protect the voters from themselves, or to grant the fire protection districts in St. Louis County a permanent right to extract tax revenue from an annexed area. The voters in St. Louis County should be able to make their own decisions about how fire protection service is provided without a county-specific statute making their decision for them. Fire protection districts in St. Louis County should be subject to the same regulations as those in the rest of the state. The general laws applicable to the rest of the state could be applicable within St. Louis County. Alternately, the General Assembly must treat all charter counties the same and provide a general law governing annexation applicable to all charter counties, rather than a law that discriminates against the cities in St. Louis County.

I. Conclusion – Point I.

Section 72.418 applies to certain cities based on criteria that, though they may appear open-ended, are not subject to change. No city presently subject to § 72.418 could become subject to § 321.322.1 instead. No city presently subject to § 321.322.1 could become subject to § 72.418. The General Assembly could have made a general law giving charter counties the option to be subject to § 72.418, but instead chose to

discriminate against cities in St. Louis County. Because § 72.418 treats cities in St. Louis County differently from cities outside St. Louis County without a substantial justification, or even a rational basis, and because it is practically impossible for cities to move from one classification to another, this Court must reverse the trial court's judgment and declare that § 72.418 violates Mo. Const. art. III § 40(30), and enjoin its enforcement.

II. The trial court erred in granting judgment for Respondents, ruling that § 72.418, RSMo. is not a special law because it violates Mo. Const. art. III, § 40(21) in that it is a special law that regulates the affairs of Crestwood by preventing it from enforcing its ordinances in part of the City and by inhibiting its ability to provide or negotiate for fire protection services.

Error Preserved for Appellate Review

Appellants preserved this issue for appellate review, in that the trial court granted Respondents' motion for judgment on the pleadings, and denied Appellants' motion for summary judgment, finding that § 72.418, RSMo. was not an unconstitutional special law. Appellants timely appealed the trial court's judgment.

Standard of Review

The trial court entered judgment granting Respondents' motion for judgment on the pleadings and denying Appellants' motion for summary judgment as to Count I of Appellants' First Amended Petition. "Because a judgment on the pleadings addresses an issue of law, our review is *de novo* and without deference to the circuit court's ruling." State ex rel. Kansas City Symphony, 311 S.W.3d at 274. "In reviewing the grant of a motion for judgment on the pleadings, this Court must decide 'whether the moving party is entitled to judgment as a matter of law on the face of the pleadings.' 'The well-pleaded facts of the non-moving party's pleading are treated as admitted for purposes of the motion.' 'A grant of judgment on the pleadings will be affirmed only 'if the facts pleaded by the petitioner, together with the benefit of all reasonable inferences drawn therefrom, show that petitioner could not prevail under any legal theory.'" Emerson Elec. Co., 362 S.W.3d at 12 (internal citations omitted). Review of the trial court's decision denying Appellants' motion for summary judgment is "essentially de novo, as the propriety of summary judgment is an issue of law." Independence, 995 S.W.2d at 486.

Argument

The trial court's judgment granting judgment on the pleadings in favor of Respondents must be reversed. Though the trial court's judgment addresses Appellants' arguments regarding art. III, § 40(30), it is silent as to art. III, § 40(21), which prohibits

the enactment of a special law "creating offices, prescribing the powers and duties of officers in, or regulating the affairs of counties, cities, townships, election or school districts." Count I of Appellants' First Amended Petition alleged that § 72.418 violates both art. III, §§ 40(21) and 40(30). D2 p. 18. Further, Respondents failed to address this issue altogether in their motion for judgment on the pleadings. D26. This issue was only addressed in Appellants' motion for summary judgment, Respondents' suggestions in opposition thereto, and Appellants' reply. D9 pgs. 22-23; D29 pgs. 17-18; and D33 pgs. 19-20, respectively. This court must reverse the trial court's judgment because § 72.418 is a special law that unquestionably regulates the affairs of Crestwood.

Crestwood is a constitutional charter city possessing "all powers which the general assembly of the state of Missouri has authority to confer upon any city, provided such powers are consistent with the constitution of this state and are not limited or denied either by the charter so adopted or by statute. Such a city shall, in addition to its home rule powers, have all powers conferred by law." Mo. Const. art. VI, § 19(a). Section 2.1 of Crestwood's Charter provides that the City has "all powers the General Assembly of the State of Missouri has authority to confer upon any city, provided such powers are consistent with the Constitution of this State and are not limited or denied either by this Charter or by statute. The city shall, in addition to its home rule powers, have all powers conferred by law." Section 2.2 of Crestwood's Charter provides that the "powers of the city shall be liberally construed."

State law gives Crestwood the power to inspect buildings and to suppress fires, and to adopt ordinances and technical codes regulating same. *See* § 79.450, RSMo. (cities can "regulate and control the construction of buildings," … "organize fire companies," … "make all necessary expenditures for the purchase of such fire apparatus and the payment of such fire companies," … and adopt ordinances necessary for same); *See* § 67.280, RSMo. (cities can adopt technical codes regarding construction of buildings, fire prevention). Crestwood has passed an ordinance adopting the 2015 International Fire Code, with certain amendments, to govern fire protection and prevention within the City's territorial limits. D18 pgs. 1-21.

The District has also adopted the 2015 International Fire Code. D22 pgs. 1-24. Since the District serves the Annexed Area within the City of Crestwood, a conflict arises as to which entity conducts inspections and is responsible for enforcing ordinances. By permitting the District to essentially retain its jurisdiction of part of the City post-annexation, § 72.418 regulates the affairs of Crestwood. Crestwood, unlike all other charter cities in every other county, is inhibited from enforcing its ordinances in a significant portion of the City. D17 pgs. 1-2. The Annexed Area is governed by two sovereigns, each empowered by law to provide fire protection services. While the District is prohibited by § 321.228, RSMo., enacted in 2012, from enforcing a residential construction regulatory system in a city in which it is partially located, no such prohibition exists regarding non-residential property. Crestwood is uniquely unable to enforce some of its building/fire safety regulations on the businesses in part of the City.

In their suggestions in opposition to Appellants' motion for summary judgment, Respondents argued that there is no violation of art. III, § 40(21) because fire protection is a police power vested in the state, which it can delegate to cities however the state chooses to do so. D29 pgs. 17-18. Further, Respondents argued that the state can take away or restrict this delegated function at its discretion, and that § 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)." D29 p. 18.

Respondents' arguments are without merit. Appellants do not dispute that fire protection is a police power of the state, which the state can delegate subject to whatever restrictions it deems appropriate. What art. III, §§ 40(21) prohibits is a *special law* that regulates a city's affairs. The General Assembly can restrict the ability of cities to exercise a delegated police power by general law. Under art. III, §§ 40(21), it cannot do so by special law. Cities throughout the state are empowered to provide fire protection service to *all* their residents, subject to restrictions enacted by the General Assembly. Due to § 72.418, Crestwood suffers unique restrictions not applicable to the rest of the state. Furthermore, the jurisprudence regarding whether a special law has a rational basis or is

substantially justified relates solely to art. III, § 40(30). Therefore, § 72.418 cannot be salvaged, even if it is substantially justified.

Cities outside of St. Louis County are free to make decisions as to whether their residents would be best served by establishing their own municipal department, contracting with another municipal department (§ 71.370, RSMo.), a private fire department (§ 85.012, RSMo.), or entering into some other arrangement. Crestwood has no say in how fire protection service is provided in a portion of the City due to § 72.418. Only Crestwood, and similarly situated cities in St. Louis County, are inhibited from re-evaluating the best method to serve its residents and adapting to ever-changing conditions. Crestwood is without any discretion as to how a significant portion of the City is served.

In addition to the restrictions imposed on Crestwood by § 72.418.2, subsection 3 of § 72.418 also regulates Crestwood's affairs (without regulating the affairs of other cities outside St. Louis County) by precluding Crestwood from making local decisions about fire protection service because the "fire protection district may approve or reject any proposal for the provision of fire protection and emergency medical services by a city." Other cities are free to make determinations as to how its citizens would be best served. Here, all the negotiating power is vested with the fire protection district, which has no incentive to consider alternate arrangements which might result in a decrease in revenue.

Since § 72.418 applies only to cities in St. Louis County, it is a special law regulating the affairs of a city in violation of art. III, §40(21). This Court should reverse the trial court's judgment and enter judgment in favor of Appellants as to Count I of Appellants' First Amended Petition declaring that § 72.418 is a special law regulating Crestwood's affairs, and enjoining its enforcement.

III. The trial court erred in granting judgment for Respondents, ruling that § 321.322.3 is not a special law because it violates Mo. Const. art. III, § 40(30) in that its real effect is to apply only to cities in St. Louis County and their inhabitants in perpetuity and subject them to a different set of statutes than those governing similarly situated cities in other counties.

Error Preserved for Appellate Review

Appellants preserved this issue for appellate review, in that the trial court granted Respondents' motion for judgment on the pleadings, and denied Appellants' motion for summary judgment, finding that § 321.322.3, RSMo. was not an unconstitutional special law. Appellants timely appealed the trial court's judgment.

Standard of Review

The trial court entered judgment granting Respondents' motion for judgment on the pleadings and denying Appellants' motion for summary judgment as to Count II of Appellants' First Amended Petition. "Because a judgment on the pleadings addresses an issue of law, our review is *de novo* and without deference to the circuit court's ruling." State ex rel. Kansas City Symphony, 311 S.W.3d at 274. "In reviewing the grant of a motion for judgment on the pleadings, this Court must decide 'whether the moving party is entitled to judgment as a matter of law on the face of the pleadings.' 'The well-pleaded facts of the non-moving party's pleading are treated as admitted for purposes of the motion.' 'A grant of judgment on the pleadings will be affirmed only 'if the facts pleaded by the petitioner, together with the benefit of all reasonable inferences drawn therefrom, show that petitioner could not prevail under any legal theory.'" Emerson Elec. Co., 362 S.W.3d at 12 (internal citations omitted). Review of the trial court's decision denying Appellants' motion for summary judgment is "essentially de novo, as the propriety of summary judgment is an issue of law." Independence, 995 S.W.2d at 486.

Argument

The trial court erred in determining that because "§ 72.418.2 is valid, [the trial court] need not reach this question" regarding § 321.322.3. D38 p. 6; App A8. The trial court's judgment granting Respondents' motion for judgment on the pleadings and

denying Appellants' motion for summary judgment should be reversed, and § 321.322.3 should be declared unconstitutional and enjoined by this Court.

A. Section 321.322.3 is a Special Law Because it Can Only Apply to Cities in St. Louis County.

Section 321.322.1 governs the relationship between a city that maintains a fire department that annexes territory served by a fire protection district in every county except for St. Louis County. Under § 321.322.1, the city "shall within sixty days assume by contract with the fire protection district all responsibility for payment in a lump sum or in installments an amount mutually agreed upon by the fire protection district and the city for the city to cover all obligations of the fire protection district to the area included within the city, and thereupon the fire protection district shall convey to the city … any such tangible real and personal property of the fire protection district as may be agreed upon," located within the city. If such an agreement is not reached, the five-year drawdown period is triggered, providing for the city to assume fire protection responsibility and for the fire protection district to receive a diminishing portion of the tax revenue it had received from the area annexed. Alternately, the city and the fire protection district can negotiate a mutually agreeable contract.

Subsection 3 of § 321.322 provides that the statute "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." Since only St. Louis County has more than 900,000 inhabitants, only cities in St. Louis County are excluded from the rest of § 321.322. The General Assembly selected the population of 900,000 to ensure that no other county will be excluded from § 321.322 and to ensure that cities in St. Louis County remain subject to § 72.418. The trial court's decision provided no rationale why § 321.322.1 could not apply statewide, even if St. Louis County retained its boundary commission.

After St. Louis County, the next-most populous county is Jackson County, which had 674,158 inhabitants in 2010. In the 1970 U.S. Census, the population of Jackson County was measured at 654,178. No other county had more than 360,485 inhabitants in 2010. No other county, including Jackson County, could conceivably become subject to

§ 321.322.3 in the foreseeable future. For Jackson County to become subject to § 321.322.3, it would need to add roughly 225,000 people. It has only gained roughly 20,000 between 1970 and 2010. Even in the unlikely event that Jackson County's population increased by 20,000 each decade, let alone over forty years, it would still take over one hundred years to reach 900,000. In DeSoto, the court noted that only one other city (Crystal City) could possibly meet the population range limiting § 321.322.4 to the City of DeSoto. 476 S.W.3d at 289, n. 7. The court noted that, "[a]ssuming that rate continues consistently, Crystal City will not fall within the boundaries of the city-population classification for another 45 years. As a practical matter, Crystal City will not fall within all six criteria of the statute." Id. Here, there is no scenario in which Jackson County's population would reach 900,000 within forty-five years, or even one hundred years. There is simply no fact pattern in which § 321.322.3 would apply to any cities aside from those in St. Louis County in the foreseeable future.

Since there is no statutory maximum population or ceiling in § 321.322.3, St. Louis County's population could never increase in such a way as to remove the cities in St. Louis County from the exclusion in § 321.322.3. Similarly, a loss in population, dropping St. Louis County below 900,000 inhabitants is, as a practical matter, not foreseeable. In City of Normandy, 518 S.W.3d at 193, this Court struck down §§ 67.287 and 479.359.2, RSMo., which applied only to cities within a charter county that has more than 950,000 inhabitants. This Court held that, although St. Louis County's population had decreased from 998,954 in 2010 to 998,581 in 2016, "this estimated 0.04-percent decrease over seven years is not enough to persuade this Court that St. Louis County, 'as a practical matter,' is 'likely' to fall below … [950,000] in the 'foreseeable future.'" Id. at 195. It is even more unlikely that St. Louis County's population would fall below 900,000 in the foreseeable future. As in Normandy, as a practical matter, the real effect of § 321.322.3 is to exclude cities in St. Louis County, and only such cities, for the foreseeable future.

Furthermore, even if Jackson County were to reach 900,000 inhabitants, the cities in Jackson County would be excluded from § 321.322.1, and yet would not be subject to

§ 72.418 (because it has only eighteen cities). The only possible way that Jackson County's *classification* would change is for a county to reach both criteria: 900,000 inhabitants, and have fifty municipalities established therein (plus all the remaining criteria in § 72.401 for § 72.418.2 to apply). Since no county has more than twenty-three municipalities, and no county, not even Jackson County, could conceivably reach 900,000 inhabitants, there is no possibility that the classification could change. Cities in St. Louis County will always be treated differently than cities in all other counties. The only conclusion that can be drawn is that the population floor of 900,000 in § 321.322.2 is designed not to be reached.

B. Regardless of *Jefferson County* & *Normandy*, § 321.322 is a Special Law.

Respondents will certainly point to this Court's decision to apply the test in Jefferson County only prospectively to argue that it does not apply to § 321.322.3, which was enacted prior to 2006. As in Jefferson County, this Court limited a portion of its holding in Normandy to statutes enacted after 2017. Normandy modified the third prong of the Jefferson County test ("the population range is so narrow that the only apparent reason for the narrow range is to target a particular political subdivision and to exclude all others,") by holding that the population floor of 950,000 in §§ 67.287 and 479.359.2 was a "range," but applied this ruling only prospectively. 518 S.W.3d at 193. As in the statute at issue in Normandy, § 321.322.3 uses a population floor rather than a range.

Even when considering the prospective nature of Jefferson County and Normandy, the Court stated very clearly in DeSoto that "Jefferson County was not a break with prior law, however, for earlier cases similarly had held that this Court must look to the *real effect of statutory criteria rather than to their nominal generality* to determine whether the law is a general or special one." 476 S.W.3d at 288, n. 4. Emphasis added. This Court must consider the real effect of the population floor in § 321.322, and not be swayed by its appearance of being open-ended. As set forth herein, the only reasonable interpretation of § 321.322.3 is that it was crafted to ensure that always excluded cities in St. Louis County (and *only* cities in St. Louis County) from the framework applicable to the

remainder of the state. § 321.322.3 is a special law regardless of the prospective nature of Jefferson County and Normandy.

Further, there is an inherent flaw in this Court's pre-Jefferson County jurisprudence. Specifically, while this Court had generally considered population-based criteria as open-ended prior to Jefferson County, that rationale was premised on the notion that population is "subject to change" and that other cities "may fall into the classification" in the future. *See* City of Branson, 945 S.W.2d at 449; *see also* Jefferson County, 205 S.W.3d at 870. That reasoning is fundamentally inconsistent with § 1.100.2, RSMo. which provides that "any law which is limited in its operation to counties, cities or other political subdivisions having a specified population … shall be deemed to include all counties, cities or political subdivisions which thereafter acquire such population … *as well as those in that category at the time the law passed*." Emphasis added. When § 321.322.3 was amended in 1992 to exclude counties with a population over 900,000, St. Louis County's population exceeded 900,000. Cities in St. Louis County will therefore always be subject to § 321.322.3 because St. Louis County met the population threshold at the time the law was passed. Whether St. Louis County's population skyrockets or plummets, it is a historical fact that its population exceeded 900,000 when the law passed. Further, the General Assembly recently amended § 1.100 in a way that makes clear that even a dramatic population loss would not remove St. Louis County from § 321.322.3, discussed further, *infra*.

This Court has acknowledged that where population at a fixed point in time is used as a statutory criteria, it is not open-ended. In State ex rel. City of Blue Springs v. Rice, 853 S.W.2d 918, 920 (Mo. banc 1993), this Court declared a statute to be a special law because the statute applied to "any city of the fourth class having a population in the 1980 decennial census of more than twenty-five thousand but less than twenty-six thousand…." Id. at 919. "Classifications based on population *may* be open-ended. Such classifications are open-ended *when it is possible that a political subdivision's status under the classification could change*." Id. at 921 (internal citations omitted). Emphasis added. This Court held that "[t]he clause covering Blue Springs differs from other

population-based laws because it relies on population at a specific time before the enactment of the clause. The 1980 census is an unchanging historical fact – making it completely impossible that the status of a political subdivision under this classification could change. Therefore, it is an immutable characteristic similar to geography or constitutional status." Id.

Similarly, because § 1.100 makes a population-based statute applicable to "those in that category at the time the law passed," it requires this Court to treat a county's population at the time the law passed as a fixed historical fact, rather than an open-ended classification. That St. Louis County had a population of 993,529 in 1990 is an unchanging historical fact, making it completely impossible for the status of cities in St. Louis County to change. Crestwood will always be a city within a county with a population that exceeded 900,000 when § 321.322.3 was passed in 1991. Crestwood will always be excluded from § 321.322. Therefore, a county's population at the time a law was passed, even pre-Jefferson County, is an immutable characteristic.

Alternatively, the Court may wish to reexamine its prospective-only application of Jefferson County and Normandy. The idea that the rights created by the Missouri Constitution apply to some individuals at certain times but not to other individuals at other times is troublesome. This is especially so when prospective application favors the very type of legislation the constitution sought to preclude at the expense of the right sought to be protected – the right of Missouri individuals and entities is to be safeguarded from special legislation enacted by the legislature. This is especially so when prospective application results in disparate treatment, arguably in perpetuity.

C. Section 1.100 (Supp. 2017) Renders Population an Immutable Characteristic.

Lest there be any doubt that a loss in population by St. Louis County would not lead to a change in its classification under § 321.322.3, the General Assembly removed all doubt when it amended § 1.100.2.[18] Prior to August 28, 2017, § 1.100.2 stated that "[o]nce a city not located in a county has come under the operation of such a law a

[18] Prior to the 2017 amendment, § 1.100 had not been amended since 1971.

subsequent loss of population shall not remove that city from the operation of that law." Only the City of St. Louis is not located in a county. The statute was silent as to all other cities and counties. As of August 28, 2017, the statute was amended to revise this sentence to state that "[o]nce a city, county, or political subdivision has come under the operation of such a law a subsequent change in population shall not remove that city, county, or political subdivision from the operation of that law regardless of whether the city, county, or political subdivision comes under the operation of the law after the law was passed." After this amendment, is it is now indisputable that St. Louis County, and the cities within St. Louis County, could never change their status under § 321.322.3. An increase in population is meaningless because there is no statutory maximum. A decrease in population now unquestionably would not affect St. Louis County's status under § 321.322.3. Since it is a historical fact that St. Louis County had more than 900,000 inhabitants when § 321.322.3 went into effect, it is a closed-ended characteristic. Crestwood will remain subject to the exclusion in § 321.322.3 even if St. Louis County's population falls below 900,000. Accordingly, population-based criteria in statutes can no longer be said to be open-ended because cities cannot come into and out of a statutory range. Their classifications cannot change. The amendment to § 1.100 renders the concept of characterizing population-based statutes as open-ended untenable.

D. Sections 72.418 and 321.322 Must be Read *In Para Materia*.

Sections 72.418 and 321.322.3 operate as concurrent bars to cities in St. Louis County, ensuring that those cities are not subject to the regulatory regime applicable to the rest of the state. These statutes, and the criteria limiting their application to St. Louis County should be viewed *in para materia*. "In determining the intent and meaning of statutory language, the words must be considered in context and sections of the statutes *in pari materia*, as well as cognate sections, must be considered in order to arrive at the true meaning and scope of the words." South Metro. Fire Prot. Dist. v. City of Lee's Summit, 278 S.W.3d 659, 666 (Mo. banc 2009). Under DeSoto, statutory criteria excluding a political subdivision from the operation of a law must be considered collectively. Here, it is totally impossible for cities within St. Louis County to ever meet the criteria for it to be

removed from the ambit of § 72.418 and become subject to the general operation of § 321.322. Likewise, it is virtually impossible, and certainly unforeseeable, for any other political subdivision to be removed from the ambit of § 321.322.1 and become subject to § 72.418. The General Assembly has clearly crafted these statutes to provide one rule for cities in St. Louis County and one rule for all others. Therefore, this Court should consider the statutes *in pari materia*, find that these statutes are unconstitutional, sever § 72.418 from the Boundary Commission Act, and sever subsection 3 from § 321.322.

E. The General Assembly Did Not Comply With Art. III, § 42 When It Enacted § 321.322.

As set forth in Point I(F) of this brief, special laws may only be enacted if notice has been provided in the affected locality and notice is recited in the bill. Article III, § 42, of the Missouri Constitution provides that:

> No local or special law shall be passed unless a notice, setting forth the intention to apply therefor and the substance of the contemplated law, shall have been published in the locality where the matter or thing to be affected is situated at least thirty days prior to the introduction of the bill into the general assembly and in the manner provided by law. *Proof of publication shall be filed with the general assembly before the act shall be passed and the notice shall be recited in the act*.

Emphasis added. Senate Bill 34 (1991), enacting the language in § 321.322.3 which excluded cities in St. Louis County, contained no such recitation. 1991 Mo. Laws, pgs. 380-404; App A43-A67. Likewise, House Bill 167 (1985), which first enacted § 321.322, and in which subsection 3 excluded "any county of the first class having a charter form of government and not containing any portion of a city with a population of over three hundred fifty thousand" contained no recitation that notice was given in St. Louis County, the only county excluded from the statute's operation. 1985 Mo. Laws, pgs. 772-774; App A24-A26. Therefore, if Respondents assert that § 321.322.3 is special but substantially justified, this Court need not reach the issue of substantial justification. Since none of the bills enacting and amending § 321.322.3 recited the notice mandated by art. III, § 42, § 321.322.3 is unconstitutional and void.

F. There is No Substantial Justification or Rational Basis for § 321.322.3

Even if the Court reaches the issue of whether there is a substantial justification, or even a rational basis, for excluding cities in St. Louis County from § 321.322, the statute fails because there is no possible justification for treating cities in St. Louis County differently than the rest of the state.

Under Treadway v. State, if a statute is special, the court must determine if "the vice that is sought to be corrected [is] 'so unique to the persons, places, or things classified by the law that a law of general applicability could not achieve the same result?'" 988 S.W.2d at 511 (internal citations omitted). Here, § 321.322.3 discriminates against cities in St. Louis County. A general law could be made applicable to all cities by applying § 321.322.1 statewide. Neither Respondents nor the trial court cites a rationale as to why § 321.322.1 could not apply to cities in St. Louis County, regardless of whether it has a boundary commission. As set forth under Point I(G), a boundary commission provides *additional* protections for fire protection districts against municipal annexations. Fire protection districts in St. Louis County are *less likely* to experience annexations than districts in other counties, where there are fewer obstacles to municipal annexation. Further, while the District maintains that § 72.418.2 is necessary to protect its financial outlook, the District identifies no reason why it is dissimilar to the fire protection districts subject to § 321.322.1 and therefore entitled to additional protections.

Likewise, it is immaterial that some time has passed since the annexation has occurred. The District owns no real or personal property within the Annexed Area and it has been compensated for *every penny* in tax revenue it would have levied in the Annexed Area for over twenty years. The District has identified no reason why it should receive favored treatment (ongoing receipt of lost property tax revenue) which is not available to the fire protection districts in the rest of the state. The payment the District receives by virtue of §72.418.2 is designed to offset the loss of tax revenue "which the fire protection district would have levied on all taxable property within the annexed area." It is not intended to be a never-ending subsidy to finance operations elsewhere.

Fire protection districts outside St. Louis County whose territory is annexed receive tax revenue from the annexed area for up to five years under § 321.322.1. Section 72.418 (and the exclusion of St. Louis County in § 321.322.3) gives fire protection districts in St. Louis County the ability to collect property tax revenue from annexed areas in perpetuity. There is no reason why the District could not operate under the regulatory framework applicable to fire protection districts in the rest of the state.

Similarly, if the state contends that cities in St. Louis County must be subject to different laws than the rest of the state regarding municipal annexation and fire protection, it must put forth a rationale for treating cities in the other charter counties differently. Respondents must answer the question of why, if cities in St. Louis County must be excluded from § 321.322.1, should cities in Jackson, Jefferson, and St. Charles County not be excluded from § 321.322.1? Respondents did not do so in the trial court. There is no substantial justification, and no rational basis, for the disparate treatment. A general law may be made applicable.

As under Point I(G), the provision of subsection 3 of § 321.322 are severable from the remainder of the statute. There is no indication that subsection 3 is so "essentially and inseparably connected with, and so dependent upon, the void provision that it cannot be presumed the legislature would have enacted the valid provisions without the void one," as required to sever a statute under § 1.140, RSMo.

G. Conclusion – Point III.

Subsection 3 of § 321.322 only applies to cities in St. Louis County. It excludes cities in St. Louis County from application of the remainder of § 321.322 that applies to every other county in the state. There is no reason why this general law (§ 321.322.1) could not apply statewide. The Court should conclude that § 321.322.3 is a special law, sever subsection 3 from § 321.322 and enjoin its enforcement, reverse the trial court's judgment and enter judgment in favor of Appellants as to Count II of Appellants' First Amended Petition.

IV. The trial court erred in granting judgment for Respondents, ruling that § 72.418 does not violate Mo. Const. art. X, § 11 because this statute produces a tax rate by a municipality in excess of $1.00 on each hundred dollars of assessed valuation in a portion of the City because the annual payment mandated by § 72.418 exceeds $1.00 per $100 of assessed valuation without a two-third vote of the qualified electors, violating the clear purpose of art. X, § 11.

Error Preserved for Appellate Review

Appellants preserved this issue for appellate review, in that the trial court granted Respondents' joint motion for judgment on the pleadings, and denied Appellants' motion for summary judgment, finding that § 72.418, RSMo. did not violate Mo. Const. art. X, § 11. Appellants timely appealed the trial court's judgment.

Standard of Review

The trial court entered judgment granting Respondents' motion for judgment on the pleadings and denying Appellants' motion for summary judgment as to Count III of Appellants' First Amended Petition. "Because a judgment on the pleadings addresses an issue of law, our review is *de novo* and without deference to the circuit court's ruling." State ex rel. Kansas City Symphony, 311 S.W.3d at 274. "In reviewing the grant of a motion for judgment on the pleadings, this Court must decide 'whether the moving party is entitled to judgment as a matter of law on the face of the pleadings.' 'The well-pleaded facts of the non-moving party's pleading are treated as admitted for purposes of the motion.' 'A grant of judgment on the pleadings will be affirmed only 'if the facts pleaded by the petitioner, together with the benefit of all reasonable inferences drawn therefrom, show that petitioner could not prevail under any legal theory.'" Emerson Elec. Co., 362 S.W.3d at 12 (internal citations omitted). Review of the trial court's decision denying Appellants' motion for summary judgment is "essentially de novo, as the propriety of summary judgment is an issue of law." Independence, 995 S.W.2d at 486.

Argument

The trial court erroneously ruled that, because the "intergovernmental payment" mandated by § 72.418 was not a tax, there was no violation of Mo. Const. art. X, § 11.

D38 p. 6; App A8. The trial court's judgment as to Count III of Appellants' First Amended Petition must be reversed because Missouri statutes and case law do not establish or define an "intergovernmental payment," and § 72.418 runs afoul of art. X, §§ 11(b) and (c) by creating an effective municipal tax rate in excess of the amount authorized by these constitutional provisions. This Court should find that § 72.418 creates a result that the Missouri Constitution forbids: a tax rate by a municipality in excess of $1.00 on each hundred dollars of assessed valuation in the Annexed Area. The trial court's judgment granting judgment on the pleadings to Respondents, and denying summary judgment to Appellants, must be reversed.

A. Mo. Const. Art, X, §§ 11(b) and (c) Place Caps on Local Taxing Authority.

Article X, § 11(b) of the Missouri Constitution provides that "[a]ny tax imposed upon such property by municipalities, counties or school districts, for their respective purposes, shall not exceed the following annual rates: … For municipalities – one dollar on the hundred dollars assessed valuation…." Article X, § 11(c) of the Missouri Constitution provides that a rate of one dollar on the hundred dollars assessed valuation may only be exceeded if the proposed increase is "submitted to a vote and two-thirds of the qualified electors voting thereon shall vote therefor…."

In 2017, the total assessed valuation in the Annexed Area was $37,231,830.00. D10 p. 5. Crestwood was obligated to collect tax revenue from its residents and pay $540,518.07 to the District in 2017, which represented the "amount equal to that which the fire protection district would have levied on all taxable property within the annexed area" required by § 72.418. D10 p. 3.

Dividing $37,231,830.00 (total assessed valuation) by the payment mandated by § 72.418 ($540,518.07), and multiplying same by one hundred results in an effective tax rate of $1.451763 per one hundred dollars of assessed valuation, in excess of the amount permitted by art. X, §§ 11(b) and (c) without approval of two-thirds of the qualified electors. It is undisputed the effective tax rate of $1.45 per one hundred dollars of

assessed valuation in the Annexed Area was not approved by the qualified voters therein (nor by the voters within the District's service area, or the voters in Crestwood). D6 p. 10.

Article X, §§ 11(b) and (c) must be given a broad reading to effectuate the people's clear purpose in limiting the amount of taxes which can be levied. "The fundamental purpose of constitutional construction is to give effect to the intent of the voters who adopted the Amendment. Traditional rules of construction dictate looking at words in the context of both the particular provision in which they are located and the entire amendment in which the provision is located." Keller v. Marion County Ambulance Dist., 820 S.W.2d 301, 302 (Mo. banc 1991) (internal citations omitted). "In arriving at the intent and purpose the construction should be broad and liberal rather than technical, and the constitutional provision should receive a broader and more liberal construction than statutes." School Dist. of Kansas City v. State, 317 S.W.3d 599, 605 (Mo. banc 2010) (internal citations omitted).

The clear intent of art. X, § 11(b) is to forbid the imposition of such excessive tax burdens, regardless of how the payment is denominated. "[U]nder Article X, Section 10(a) and Section 11, taken in its entirety, the legislature is forbidden to extend authority for any ad valorem taxes not specifically provided or authorized in the constitution; …." Three Rivers Junior Coll. Dist. of Poplar Bluff v. Statler, 421 S.W.2d 235, 238 (Mo. banc 1967). When this Court gives art. X, §§ 11(b) and 11(c) the broad interpretation mandated for constitutional provisions, it is clear that § 72.418 mandates what is intolerable under the Missouri Constitution: a tax rate collected by a municipality (that is then transferred to a fire protection district) of greater than one dollar on the hundred dollars assessed valuation, without the approval of two-thirds of the qualified voters. The tax rate is therefore void.

B. "Intergovernmental Payments"

Respondents' construction of the payment mandated by § 72.418 as an "intergovernmental payment" is without any support and the trial court erred in adopting this construction. The Missouri Constitution and state statutes do not define "intergovernmental payment," and no reported case contains such a definition. This Court

should decline Respondents' invitation to create such a new category of payments, especially when the payment is mandated by statute. The payment mandated by § 72.418 is a tax ultimately paid by Crestwood property owners.

Respondents asserted in their motion for judgment on the pleadings that because the payment mandated by § 72.418 is collected by Crestwood and then paid over to the District, the payment is not "levied," and is therefore not a tax. D26 p. 19. Cases construing the term "tax" as used in art. X of the Missouri Constitution take a far broader approach than that proposed by Respondents. As the trial court's judgment states, "[t]axes are 'proportional contributions imposed by the state upon individuals for the support of government and for all public needs.'" Ehlmann v. Nixon, 323 S.W.3d 787, 789 (Mo. banc 2010) (internal citations omitted). D38 p. 6; App A8. A "tax by any other name remains a tax. It cannot be transformed into a user fee by adept packaging, any more than a zoologist can transform a horse into a zebra with a bucket of paint." Zweig v. Metro. St. Louis Sewer Dist., 412 S.W.3d 223, 226-227 (Mo. banc 2013). Under art. X, the inquiry is not whether a tax is called a tax or the manner of its levy or imposition. Rather, the *nature* of the charge itself is determinative. "Article X, section 22(a) of the Missouri Constitution prohibits political subdivisions 'from levying any [new or increased] tax, license or fees' without prior voter approval. Despite the breadth of this language, section 22(a) does not prohibit a political subdivision from charging an individual user a fee in exchange for rendering a service to that user, so long as this charge is not simply a tax by another name." Id. at 226.

A payment can be tax, though it is not "levied." "[T]he Hancock Amendment is intended to preclude an increase in taxes, including taxes masquerading as fees, without a public vote." Arbor Inv. Co., LLC v. City of Hermann, 341 S.W.3d 673, 682 (Mo. banc 2011). A "tax" subject to the Hancock Amendment need not be received on a taxpayer's property tax bill or enacted by an ordinance authorizing a tax levy. In Zweig, the court found a "stormwater user charge" was a tax requiring voter approval, though it was not formally "levied" by the sewer district. 412 S.W.3d at 226. Likewise, fire inspection fees charged upon a rental property inspection were found to be taxes which required voter

approval under the Hancock Amendment, though such fees were not "levied." *See* Building Owners & Managers Ass'n. of Greater Kansas City v. City of Kansas City, 231 S.W.3d 208, 210 (Mo. App. W.D. 2007).

Here, the payment by Crestwood to the District represents the amount the District would have levied in ad valorem property taxes to serve the Annexed Area. The amount collected by Crestwood to pay the District to finance the District's operations in the Annexed Area clearly exceeds the amount permitted by art. X, § 11(b) without approval of a two-thirds majority of the voters. Crestwood is compelled by § 72.418 to raise revenue from its constituents throughout the City, and to pay such amount to the District to serve the Annexed Area. The revenue raised by the City is then used to finance government operations exclusively within the District. Such revenue is unquestionably a "proportional contribution[ ] imposed by the state upon individuals for the support of government and for all public needs," as defined by Ehlmann. This Court must not condone this legislative workaround to avoid the application of art. X, §§ 11(b) and (c) of the Missouri Constitution.

Section 72.418 creates a portion of Crestwood in which the residents are deprived of the protections of art. X, §§ 11(b) and (c). The statute permits a tax rate which the Missouri Constitution deems excessive without supermajority approval by the residents subject to such tax. Because § 72.418 creates a tax rate in excess of what is permitted by art. X, §§ 11(b) and (c), this Court should reverse the trial court's judgment and find that § 72.418 violates art. X, §§ 11(b) and (c) of the Missouri Constitution, enjoin its enforcement, and enter judgment for Appellants on Count III of their First Amended Petition.

V. The trial court erred in granting judgment for Respondents, ruling that § 72.418 does not violate Mo. Const. art. I, § 10 because Appellants Roby and Hoeing are deprived of property without due process of law, in that their tax dollars are diverted to another political subdivision without an opportunity for them to voice their objections, block such transfer, or hold the elected officials receiving such funds accountable.

Error Preserved for Appellate Review

Appellants preserved this issue for appellate review, in that the trial court granted Respondents' joint motion for judgment on the pleadings, and denied Appellants' motion for summary judgment, finding that § 72.418, RSMo. did not violate Mo. Const. art. I, § 10. Appellants timely appealed the trial court's judgment.

Standard of Review

The trial court entered judgment granting Respondents' motion for judgment on the pleadings and denying Appellants' motion for summary judgment as to Count IV of Appellants' First Amended Petition. "Because a judgment on the pleadings addresses an issue of law, our review is *de novo* and without deference to the circuit court's ruling." State ex rel. Kansas City Symphony, 311 S.W.3d at 274. "In reviewing the grant of a motion for judgment on the pleadings, this Court must decide 'whether the moving party is entitled to judgment as a matter of law on the face of the pleadings.' 'The well-pleaded facts of the non-moving party's pleading are treated as admitted for purposes of the motion.' 'A grant of judgment on the pleadings will be affirmed only 'if the facts pleaded by the petitioner, together with the benefit of all reasonable inferences drawn therefrom, show that petitioner could not prevail under any legal theory.'" Emerson Elec. Co., 362 S.W.3d at 12 (internal citations omitted). Review of the trial court's decision denying Appellants' motion for summary judgment is "essentially de novo, as the propriety of summary judgment is an issue of law." Independence, 995 S.W.2d at 486.

Argument

The trial court erroneously ruled that Appellants Roby and Hoeing are not deprived of property without due process of law by operation of § 72.418. The trial court held that because Roby and Hoeing "have not challenged the validity of the property

taxes that they pay to the City of Crestwood … [n]or have they questioned that fire protection and emergency medical services are public purposes," they were not deprived of property without due process of law." D38 p. 9; App A11. The trial court further held that the "intergovernmental payment is not a tax. Moreover, due process does not require that everyone subject to a property tax be able to vote for those imposing a tax." D38 p. 9; App A11. The trial court's judgment is incorrect as a matter of law and must be reversed.

Article I, § 10 of the Missouri Constitution provides that "no person shall be deprived of life, liberty or property without due process of law." Similarly, § 1 of the Fourteenth Amendment to the U.S. Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law…." Roby and Hoeing, as taxpayers "do, in fact, have a legally protectable interest in the proper use and expenditure of tax dollars." Lebeau v. Commissioners of Franklin County, 422 S.W.3d 284, 288 (Mo. banc 2014). The payment mandated by § 72.418 is a direct expenditure of taxpayer money. Appellants Roby and Hoeing suffer an increased levy of taxes and a pecuniary loss due to the payment mandated by § 72.418. The payment is made to a neighboring political subdivision of the state for its own benefit to be utilized outside of Crestwood (with the exception of the Annexed Area). The due process requirements of the Missouri and U.S. Constitutions apply to the taking of property by taxation without affording an opportunity to be heard and object. "We also agree that no law can authorize the taking of one's property by taxation or otherwise without affording such person the right and an opportunity to be heard at some time and place in opposition, and no law is constitutional when tested by 'due process of law' unless such right be awarded." Garden of Eden Drainage Dist. v. Bartlett Tr. Co., 50 S.W.2d 627, 629 (Mo. 1932).

Here, because § 72.418 mandates that tax money be collected by Crestwood and then paid over to the District, Appellants Roby and Hoeing are unable to avail themselves of the typical mechanisms by which one might challenge a tax payment, or object to its imposition in the first instance. Crestwood is without a say in whether it collects the revenues necessary to pay the District, so for Roby and Hoeing to make their objections

known to their elected officials would be unavailing. Roby and Hoeing have no means to block the District from increasing the amount they must pay in taxes, or influencing the District's financial decisions because § 72.418 prohibits them from voting in the District's elections (either for tax increases or positions on the District's Board of Directors). Section 72.418 simply mandates that Roby and Hoeing make the payments demanded, in the amount set by the District. The District's directors are free to ignore any complaints from Roby and Hoeing when the District decides to increase the amount it requires from Crestwood, because Roby and Hoeing cannot vote in the District's elections. None of the ordinary checks and balances for citizens to hold their elected officials accountable are available to Roby and Hoeing. "In order for the requirements of due process to be met, parties whose rights are to be affected must be given notice and the opportunity to be heard. The notice and opportunity to be heard must be at a meaningful time and in a meaningful manner." City of Kansas City v. Jordan, 174 S.W.3d 25, 42 (Mo. App. W.D. 2005) (internal citations omitted). Yet § 72.418 affords no means for Roby and Hoeing to dispute the amount of the payment or challenge its legitimacy. They are deprived of the ability to hold the District's directors accountable for their fiscal policies and decisions. Yet the District is free to extract money from Crestwood's taxpayers to meet its needs, without their input, and without fear of electoral repercussions. There is nothing to stop the District from increasing its tax levy even if it becomes more than the residents of Crestwood can bear. "A right to tax, without limit or control, is essentially a power to destroy." McCulloch v. Maryland, 17 U.S. 316, 391 (1819). Yet § 72.418 permits the District to wield this unlimited taxing power against its neighbors with impunity.

The tax payment mandated by § 72.418 is intended to compensate the District for the amount the District "would have levied on all taxable property within the annexed area." That the tax revenue at issue is property tax revenue, as opposed to sales tax or other similar tax based on a transaction, is critical. "For sales taxes, the applicable tax is determined by the situs of the sale." Kansas City Power & Light Co. v. Dir. of Revenue, 783 S.W.2d 910, 912 (Mo. banc 1990). Likewise, a person paying an earnings tax has

engaged in taxable activity within a taxing authority's territory. Anyone can avoid a sales tax or an earnings tax by declining to engage in the taxed activities, or doing so elsewhere. Likewise, though persons who pay a hotel-guest tax do not vote in elections regarding such taxes, taxpayers have the ability to make decisions for themselves about where they stay. The tax imposed by the District on Appellants Roby and Hoeing must be paid even if Appellants never set foot in the Annexed Area, engage in any activity therein, or otherwise avail themselves of the District's services. Appellants Roby and Hoeing are taxed simply for owning real and personal property in a city near the District. Appellants are aware of no other tax which is authorized by Missouri law which must be paid by a person simply for residing within a jurisdiction *neighboring* the taxing entity. This extraction of tax revenue is particularly galling with regard to Hoeing, who has resided in Crestwood only since 2014. Like many of the present-day Crestwood residents who did not reside in the City when it annexed the Annexed Area, she had no say in the decision to annex and has no opportunity to influence the District officials who demand her tax revenue.

No case supports the District's ability to tax ownership of property outside its territory. "The Due Process Clause of the Fourteenth Amendment imposes two requirements for such state taxation: a 'minimal connection' or 'nexus' between the interstate activities and the taxing State, and 'a rational relationship between the income attributed to the State and the intrastate values of the enterprise.'" Exxon Corp. v. Wisconsin Dept. of Revenue, 447 U.S. 207, 219-220 (1980) (internal citations omitted). "[M]unicipalities are not permitted to collect taxes on property situated outside their corporate limits." State ex rel. White v. Timbrook's Estate, 129 S.W. 1068, 1069 (Mo. App. 1910); *see also* Mobil-Teria Catering Co., Inc. v. Spradling, 576 S.W.2d 282, 283-284 (Mo. banc 1978), *reversed on other grounds by* Alumax Foils, Inc. v. City of St. Louis, 939 S.W.2d 907 (Mo. banc 1997) ("As a general rule, 'a municipal corporation's powers cease at its municipal boundaries, and cannot, without a plain delegation of the necessary power from a proper authority, be exercised outside its geographical limits.' 'So far as governmental functions are concerned, it is elementary that a municipal

corporation has no extraterritorial powers.' A municipal corporation has 'no authority to exercise any control over territory beyond its borders.' … In short, there is considerable authority to support the proposition that a municipal corporation may never tax that portion of a taxpayer's receipts which are directly derived from sales made outside its geographical limits.").

Similarly, no statute authorizes fire protection districts to directly tax activities or property outside their borders. This is clearly because any such statute would run afoul of due process protections, absent a clear nexus to the thing or activity taxed. Real and personal property situated in Crestwood (outside the Annexed Area) has no connection to the District's operations.

Because Roby and Hoeing are without any recourse to challenge the imposition of ever-increasing payments to the District, they are deprived of property without due process of law. This Court must find that the taxation scheme imposed by § 72.418 violates the due process clauses of the Missouri and U.S. Constitutions, and reverse the trial court's judgment as to Count IV of Appellants' First Amended Petition, and enter judgment in favor of Appellants.

VI. The trial court erred in granting judgment for Respondents, ruling that the Affton Fire Protection District's tax increases in 2012 and 2017 did not violate Mo. Const. art. X, §§ 16 and 22 because Roby and Hoeing suffer an increased tax burden without the ability to participate in such elections, in that a tax increase by the Affton Fire Protection District necessarily increases taxes on residents of Crestwood due to the operation of § 72.418.

Error Preserved for Appellate Review

Appellants preserved this issue for appellate review, in that the trial court granted Respondents' joint motion for judgment on the pleadings, and denied Appellants' motion for summary judgment, finding that § 72.418, RSMo. did not violate Mo. Const. art. X, §§ 16 and 22. Appellants timely appealed the trial court's judgment.

Standard of Review

The trial court entered judgment granting Respondents' motion for judgment on the pleadings and denying Appellants' motion for summary judgment as to Count V of Appellants' First Amended Petition. "Because a judgment on the pleadings addresses an issue of law, our review is *de novo* and without deference to the circuit court's ruling." State ex rel. Kansas City Symphony, 311 S.W.3d at 274. "In reviewing the grant of a motion for judgment on the pleadings, this Court must decide 'whether the moving party is entitled to judgment as a matter of law on the face of the pleadings.' 'The well-pleaded facts of the non-moving party's pleading are treated as admitted for purposes of the motion.' 'A grant of judgment on the pleadings will be affirmed only 'if the facts pleaded by the petitioner, together with the benefit of all reasonable inferences drawn therefrom, show that petitioner could not prevail under any legal theory.'" Emerson Elec. Co., 362 S.W.3d at 12 (internal citations omitted). Review of the trial court's decision denying Appellants' motion for summary judgment is "essentially de novo, as the propriety of summary judgment is an issue of law." Independence, 995 S.W.2d at 486.

Argument

The trial court erroneously determined that the District's tax increases in 2012 and 2017 did not violate art. X, §§ 16-22 (the "Hancock Amendment") of the Missouri Constitution. As under Point IV(B) of this Brief, the trial court's decision was premised

on its mistaken conclusion that the payment by Crestwood to the District "is an intergovernmental payment" rather than a tax on Crestwood's residents. Because Roby and Hoeing were forced to carry the additional tax burden of financing the District's operations – limiting Crestwood's ability to expend their tax dollars on its own operations – and because § 72.418 forbid them participating in the 2012 and 2017 elections, the tax increases violated the Hancock Amendment and are void.

Article X, § 16 of the Missouri Constitution provides that "[p]roperty taxes and other local taxes and state taxation and spending may not be increased above the limitations specified herein without direct voter approval as provided by this constitution." Article X, § 22 of the Missouri Constitution provides that "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."

"'The Hancock Amendment 'aspires to erect a comprehensive, constitutionally-rooted shield to protect taxpayers from government's ability to increase the tax burden above that borne by the taxpayers on November 4, 1980,' ' the date the Amendment was approved. 'Reduced to its essence, the Hancock Amendment reveals the voters' basic distrust of the ability of representative government to keep its taxing and spending requirements in check.'" Rohrer v. Emmons, 289 S.W.3d 600, 603 (Mo. App. E.D. 2009) (internal citations omitted). "As an additional bulwark against local government abuse of its power to tax, the voters amended the constitution to guarantee themselves the right to approve increases in taxes proposed by political subdivisions of the state." Beatty v. Metro. St. Louis Sewer Dist., 867 S.W.2d 217, 221 (Mo. banc 1993). "The Hancock Amendment assumes voters will make such decisions in their collective best interest, and it is not for … this Court … to ignore that assumption or deny the voters the right to make such decisions for themselves." Zweig, 412 S.W.3d at 244. Political subdivisions

are prohibited from "circumventing the Hancock Amendment by labeling a tax increase as a license or fee." City of Bridgeton v. Nw. Chrysler-Plymouth, Inc., 37 S.W.3d 867, 872 (Mo. App. E.D. 2001).

This Court must liberally construe the Hancock Amendment to achieve the purposes the voters intended, as mandated by Keller, 820 S.W.3d at 302, and School Dist. of Kansas City, 317 S.W.3d at 605. Specifically, the voters' clear intent in amending the constitution was to ensure that any tax increase is approved by the persons who will bear the increased financial burden.

Section 72.418 permits the District to increase the amount of tax revenue it receives while preventing a significant segment of the taxpayers subject to the increase from voting in the election. A decision to increase the District's tax levy necessarily increases the amount the District receives from Crestwood under § 72.418. Crestwood must, in turn, extract the revenue demanded by § 72.418 from its taxpayers, who have no say in their tax liability being increased. Appellants Roby and Hoeing bore an increased tax burden when the District increased its tax rate in 2012 and 2017, yet § 72.418 disenfranchised them by prohibiting them from voting in the District's elections to increase their tax burden. This statute gives the District an end-run around the Hancock Amendment by extracting revenue from taxpayers who cannot vote in their elections, turning Crestwood's government into a middle-man from whom the District demands payment. Because Roby, Hoeing,[19] and other Crestwood residents were not permitted to vote on the District's 2012 and 2017 property tax increases, these tax increases did not receive the "direct voter approval" mandated by art. X, § 16.

It is impossible to imagine that the drafters of the Hancock Amendment intended for its provisions to be circumvented by a statute requiring one political subdivision to collect the increased revenue on behalf of another political subdivision, whose voters approved the increase. Therefore, the trial court's focus on intergovernmental payments is misplaced. Once the District increases its tax rate, additional revenue must be

[19] Because Hoeing has only resided in Crestwood since 2014, her claim relates only to the 2017 election.

generated from Crestwood's taxpayers outside the Annexed Area, such as Appellants Roby and Hoeing. Section 72.418 then requires Crestwood to hand the revenue over to the District. The end result is that Appellants Roby and Hoeing suffer an increased property tax burden without the opportunity to vote on the tax increases – *precisely* the result that the Hancock Amendment was enacted to avoid. Furthermore, § 72.418 irrationally permits residents within the Annexed Area, *who pay no property taxes to the District*, to vote in elections to increase the District's tax rate. This permits residents in the Annexed Area of Crestwood to vote to increase the tax burden on the remaining residents of Crestwood, while their own tax burden remains unaffected. There can be no logical argument that this arrangement is rational or that it is consistent with the intent and the letter of the Hancock Amendment.

This case is similar in many respects to City of Hazelwood v. Peterson, 48 S.W.3d 36, 39 (Mo. banc 2001), *reversed*[20] *on other grounds by* Zweig, 412 S.W.3d at 246. In Peterson, Hazelwood challenged a tax increase by a fire protection district which increased the fees which Hazelwood was required to pay to the fire protection district to serve an area annexed by Hazelwood. Id. This payment was mandated by § 321.675, RSMo. (Supp. 1986) (since repealed) and a "Fire Service Agreement" between the city and fire protection district. Id. As is the case with § 72.418, § 321.675 required Hazelwood to pay to the fire protection district an amount equal to the "annual assessed value of all property subject to tax in the excluded area … multiplied by the annual tax rate as certified by the fire protection district to the municipality … per one hundred dollars of assessed value in such area." Id. at 40. "Under this agreement, the individual taxpayers of the Northwest Area paid property taxes to Hazelwood, which in turn made payments to the District that were equal to the District's tax rate." Id. at 38.

In Peterson, this Court ultimately ruled that Hazelwood could not bring an action under the Hancock Amendment because it was not a taxpayer, stating, "[n]evertheless, '[t]he Hancock Amendment makes no pretense of protecting one level of government

[20] The portion of Peterson reversed by Zweig related to whether the Hancock Amendment authorizes refunds. Roby and Hoeing are not seeking refunds.

from another.' By limiting the class of plaintiffs to 'any taxpayer,' the amendment recognizes 'that any apparent injury to the [city] is merely derivative of the taxpayer's injury.' Hazelwood is without standing to sue under the Hancock Amendment." Id. at 40 (internal citations omitted). However, this Court held that, with regard to the payment by the city to the fire protection district mandated by § 321.675, *"[i]f paid by a taxpayer, these fees would clearly constitute a 'tax, license or fee' within the meaning of article X, section 22."* Id. Emphasis added.

Here, unlike in Peterson, this Hancock Amendment claim is brought by taxpayers Appellants Hoeing and Roby, who were deprived of their right to vote in elections which increase their tax liability. The payment mandated by § 72.418 is fundamentally of the same character as the payment at issue in Peterson mandated by § 321.675 and, here, the revenue *is paid by taxpayers Roby and Hoeing*, and is then paid over to the District.

Section 72.418.2 permits the District to indirectly do what it could not do directly: increase the amount Crestwood taxpayers pay to the District without permitting them to vote on the tax increase. Crestwood residents are taxed without representation and are deprived of any recourse from their increased tax burden. This circumvents the clear directive of the Hancock Amendment – that taxpayers have a say in whether their tax burden is increased. The District, unlike all other political subdivisions in this state, is permitted to increase the revenue it takes in without a vote of those paying the tax, and without fear of any electoral repercussions from those who are saddled with the increased tax burden.

This Court must give effect to the Hancock Amendment and declare the 2012 and 2017 tax increases by the District did not receive direct voter approval as mandated by art. X, § 16, and are therefore void. This Court should reverse the trial court's judgment granting judgment on the pleadings to Respondents, enter judgment in favor of Appellants Roby and Hoeing, and award them their costs and attorneys' fees pursuant to art. X, § 23 of the Missouri Constitution.

VII. The trial court erred in granting judgment for Respondents, ruling that § 72.418 does not violate Mo. Const. art. X, §§ 16 and 21 because the statute mandates that the City of Crestwood undertake a new and increased level of activity by financing the operations of the Affton Fire Protection District in that the City is required to both pay for its own fire department and to subsidize fire protection services in an adjacent political subdivision without an appropriation from the General Assembly.

Error Preserved for Appellate Review

Appellants preserved this issue for appellate review, in that the trial court granted Respondents' joint motion for judgment on the pleadings, and denied Appellants' motion for summary judgment, finding that § 72.418, RSMo. did not violate Mo. Const. art. X, §§ 16 and 21. Appellants timely appealed the trial court's judgment.

Standard of Review

The trial court entered judgment granting Respondents' motion for judgment on the pleadings and denying Appellants' motion for summary judgment as to Count VI of Appellants' First Amended Petition. "Because a judgment on the pleadings addresses an issue of law, our review is *de novo* and without deference to the circuit court's ruling." State ex rel. Kansas City Symphony, 311 S.W.3d at 274. "In reviewing the grant of a motion for judgment on the pleadings, this Court must decide 'whether the moving party is entitled to judgment as a matter of law on the face of the pleadings.' 'The well-pleaded facts of the non-moving party's pleading are treated as admitted for purposes of the motion.' 'A grant of judgment on the pleadings will be affirmed only 'if the facts pleaded by the petitioner, together with the benefit of all reasonable inferences drawn therefrom, show that petitioner could not prevail under any legal theory.'" Emerson Elec. Co., 362 S.W.3d at 12 (internal citations omitted). Review of the trial court's decision denying Appellants' motion for summary judgment is "essentially de novo, as the propriety of summary judgment is an issue of law." Independence, 995 S.W.2d at 486.

Argument

The trial court erroneously held that Respondents were entitled to judgment as a matter of law as to Count VI of Appellants' First Amended Petition. The trial court

determined that "[b]ecause § 72.418 RSMo. merely defines a consequence of a voluntary act, and does not unilaterally impose any burden on the City or its taxpayers, it does not violate art. X, secs 16 or 21, whether or not the General Assembly appropriates funds to pay for the costs that the City voluntarily assumed." D38 p. 9; App A11.

Article X, § 16 of the Missouri Constitution, effective as of November 4, 1980, provides that "[t]he state is prohibited from requiring any new or expanded activities by counties and other political subdivisions without full state financing, or from shifting the tax burden to counties and other political subdivisions." Similarly, Mo. Const. art. X, § 21, effective as of November 4, 1980, provides that a "new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the general assembly or any state agency of counties or other political subdivisions, unless a state appropriation is made and disbursed to pay the county or other political subdivision for any increased costs." Section 72.418 was enacted after November 4, 1980, and the formula in § 72.418.2 for payments to the District did not exist on November 4, 1980.

"This portion of the Hancock Amendment is violated if both (1) the State requires a new or increased activity or service of a political subdivision and (2) the political subdivision experiences increased costs in performing that activity or service. Article X, section 21 prevents the State from requiring local governments to begin a new mandated activity, or to increase the level of a previously mandated activity beyond its 1980-81 level, without appropriation of sufficient state monies to finance the costs of the new or increased activity." Purler-Cannon-Schulte, Inc. v. City of St. Charles, 146 S.W.3d 31, 37 (Mo. App. E.D. 2004) (internal citations omitted).

Section 72.418 obligates Crestwood to undertake a new and increased level of activity by financing the operations of the District in providing fire protection services in an adjacent political subdivision. Crestwood is obligated to finance both its own fire department and to provide fire protection services to a neighboring jurisdiction. Prior to 1980, Crestwood was obligated only to pay for fire protection services within its boundaries. Due to § 72.418, it must assist the District in providing fire protection

services to its residents. Crestwood has incurred six million dollars in costs since the enactment of § 72.418. D5 p. 1. The District has repeatedly increased the payment mandated by § 72.418 by increasing its property tax levy in 2012 and 2017, and is free to do so in the future. In no year since 1980 has the General Assembly appropriated money for cities subject to § 72.418. Therefore, § 72.418 creates an unfunded mandate by mandating Crestwood to provide fire protection service to a neighboring community, in addition to its obligation to provide fire protection service within its borders.

The trial court's judgment focuses on the voluntary nature of Crestwood's annexation to determine that there was no unfunded mandate. D38 p. 9: App A11. While annexation may have been voluntary, that does not render the alleged ongoing obligation to finance another political subdivision's fire service voluntary, particularly where, as here, such obligation is imposed only within one county of the state. Annexation is permitted by cities throughout the state. However, unlike the remainder of the state, cities in St. Louis County are saddled with the burden of financing a neighboring community's governmental operations when they undertake an annexation. Accordingly, the ongoing obligation to make payment imposed by § 72.418 triggers the constitutional protections of art. X, §§ 16 and 21.

Furthermore, § 72.418 vests the District with authority to increase its tax rate with only a vote of those within its territory (including the Annexed Area). However, residents of Crestwood outside the Annexed Area, such as Appellants Roby and Hoeing, necessarily bear an increased tax burden when the District increases its tax rate. This is precisely what transpired in 2012 and 2017. Yet no appropriation was made by the General Assembly to account for the increased costs borne by Appellants. Since the General Assembly has not appropriated funding for the City to offset these increased costs incurred, § 72.418.2 effects an unfunded mandate.

The trial court erred in entering judgment on the pleadings in favor of Respondents and in denying summary judgment in favor of Appellants. This Court should reverse the trial court's judgment and enter judgment in favor of Appellants as to Count VI of Appellants' First Amended Petition.

CONCLUSION

For the reasons set forth herein, Appellants pray that this Court reverse the decision of the trial court granting judgment on the pleadings to Respondents, reverse the trial court's decision denying Appellants' motion for summary judgment, declare that §§ 72.418 and 321.322.3 are unconstitutional and enjoin their enforcement, award Appellants their costs and attorneys' fees incurred herein, and for other such relief as the Court deems appropriate and just.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND CERTIFICATE OF COMPLIANCE WITH RULE 55.03(a)

The undersigned counsel hereby certifies that on April 15, 2019, the foregoing was filed electronically with the Clerk of Court to be served by operation of the Court's electronic filing system upon all counsel. In addition, the undersigned counsel certifies under Rule 55.03(a) of the Missouri Rules of Civil Procedure that he has signed the original of this Certificate and the foregoing pleading.

/s/ *James C. Hetlage*

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief includes the information required by Rule 55.03 and complies with the requirements contained in Rule 84.06. Relying on the word count function of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 28,283, excluding the cover, signature block and certificates of service and compliance.

The undersigned further certifies that this electronic brief was scanned for viruses and found to be virus-free.

/s/ *James C. Hetlage*