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' REPLY BRIEF

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Introduction

This case is ultimately about the injustice inherent in establishing one set of laws applicable to a disfavored subclass (cities in St. Louis County), and another set of laws applicable to the favored class (cities in all other counties). Framed differently, this case is about the injustice of affording special protections to fire protection districts in St. Louis County while denying them to all other fire protection districts. The stakes for the parties are high because the statutes applicable within St. Louis County have removed all means by which the citizens might free themselves from this inequitable legislative scheme, requiring them to use legacy fire protection districts regardless of quality of service or cost, unlike cities in all other counties. Compounding this injustice is the fire protection districts' claim that the statutes at issue do not expire and perpetuate this scheme in perpetuity.

The ban on special legislation was designed precisely to avoid this "one law for thee, and another for me" dichotomy. This Court must be guided by the principle set forth in State v. Julow, 31 S.W. 781, 783 (Mo. banc 1895), in which this Court stated:

> 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.

Respondents urge that this case is resolved simply by applying its interpretation of this Court's special law jurisprudence as it existed prior to Jefferson County Fire Prot. Districts Ass'n. v. Blunt, 205 S.W.3d 866, 869 (Mo. banc 2006). To do so would have the effect – not of protecting the citizens from the legislature – but of protecting the legislature from the express will of the people as clearly stated by them in the Missouri Constitution. This Court should not be swayed into blindly applying certain pre-Jefferson County jurisprudence. This Court acknowledged in City of DeSoto v. Nixon, 476 S.W.3d 282, 288, n. 4 (Mo. banc 2016), that:

> Jefferson County provided an important clarification of the law regarding when population-based characteristics do not preclude a law being a special law even though nominally open-ended. 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.

See also Gentry v. Armstrong, 286 S.W. 705, 708 (Mo. banc 1926); Reals v. Courson, 164 S.W.2d 306 (Mo. 1942), *overruled on other grounds*, Walters v. City of St. Louis, 259 S.W.2d 377 (Mo. banc 1953); Laclede Power & Light Co. v. City of St. Louis, 182 S.W.2d 70, 72 (Mo. banc 1944); McKaig v. Kansas City, 256 S.W.2d 815, 817 (Mo. banc 1953).

Regardless of the test applied, what matters is "[i]f in fact the act is one by its terms or in 'its practical operation, it can only apply to particular things of a class, then it will be a special or local law, however carefully its character may be concealed by form of words." Laclede, 182 S.W.2d at 72. Viewed through that lens, §§ 72.418.2 and 321.322.3 are special laws.

In their initial brief to this Court, Appellants propose that 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." This is, in fact, consistent with this Court's holding in City of Springfield v. Sprint Spectrum, L.P., 203 S.W.3d 177 (Mo. banc 2006), which Respondents identify as the "most recent articulation" of this Court's pre-Jefferson County test. In Springfield, this Court stated that a "law is general or 'open-ended' if 'the status of a political subdivision under [the] classification could change.'" Id. at 184. It is clear that no city in St. Louis County will ever be subject to § 321.322.1, and no city outside of St. Louis County will ever become subject to §§ 72.418.2 and 321.322.3. Therefore, this Court should find these sections of these statutes to be unconstitutional, sever them from the statutes, and enjoin their enforcement.

I. § 72.418.2 is a Special Law and a General Law Could Apply.

A. The "*Jefferson County* Test" Applies Only to Population Classifications.

Respondents note that this Court established a new test for special laws in Jefferson County, but applied it only prospectively. This is true, but irrelevant because § 72.418 and § 72.401, RSMo. – which limits the application of § 72.418.2 to only St. Louis County – are not limited by a population classification alone. Respondents contend that the Jefferson County test applies to population classifications as well as other statutory classifications, such as county classification, form of government, or, here, the number of municipalities in a county.

One need look no further than Jefferson County to see that Respondent's argument is inaccurate. This Court stated:

> 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.

Id. Emphasis added. The Court plainly declared that its intent to revise its test for population-based classifications, and gave no indication of intent to apply this new test to other classifications. The Court stated:

> To address this situation, and *to provide a guide by which the courts can determine* ***whether a population classification*** *will maintain its presumption of constitutionality*, this Court will apply a multifaceted test. 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. Because of the General Assembly's possible reliance on previous cases not articulating this

> presumption, only statutes passed after the date of this opinion [November 21, 2006] are subject to this analysis.

Id. at 870-871. Emphasis added. The test requires that "all three circumstances[1] exist." Id. at 870-871. If a statute does not contain a population-based characteristic, *none* of the three circumstances in the Jefferson County test exist. The prospective nature of Jefferson County is of no consequence in evaluating §§ 72.401, 72.418, and 321.322.

Furthermore, this Court's decision in DeSoto, 476 S.W.3d at 285, made clear that, when evaluating multiple statutory criteria, the Court "considers [statutory criteria] as a whole in determining whether" the law is special. This Court must look at all of the criteria limiting the application of § 72.418 to cities in St. Louis County *collectively*, and of § 321.322 to all cities in all other counties, to evaluate whether the criteria are open-ended. DeSoto instructs 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." Id. at 288, n. 4. "'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*.'" Id. (internal citations omitted). Emphasis added. Of critical importance is the fact that the statutes, operating together, remove all possibility of their "general" application.

Respondents cite to Board Educ. St. Louis v. Missouri Bd. Educ., 271 S.W.3d 1 (Mo. banc 2008), and City of St. Louis v. State, 382 S.W.3d 905 (Mo. banc 2012), as upholding statutes specifically targeting the City of St. Louis as general laws. These cases are inapposite because "St. Louis City is recognized by the Missouri Constitution as a unique entity in a unique class, and legislation enacted to address the class of which St. Louis City is the only member is not special legislation…." Jefferson County, 205 S.W.3d 872, n. 6.

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[1] This Court modified Circumstance (3) in City of Normandy v. Greitens, 518 S.W.3d 183, 193 (Mo. banc 2017), to include a population minimum as a "range," but again applied its ruling only prospectively.

B. There is No Feasible Construction of § 72.418.2 that Would Apply it Statewide.

Respondents assert that, because the criteria limiting § 72.418.2 to St. Louis County are not contained within the statute itself (but are contained in § 72.401), the statute applies to the state as a whole and is a general law. Further, they contend that because § 72.401 provides that § 72.418.2 applies in a charter county with fifty or more municipalities that has established a boundary commission, but *does not* say that § 72.418.2 *doesn't apply* elsewhere, it is a general law. The General Assembly's language used to pass Senate Bill 256 (1993), enacting § 72.418.2, refutes these contentions.

"The general assembly is presumed to be aware of existing declarations of law by the supreme court when it enacts law on the same subject…." State ex rel. Missey v. City of Cabool, 441 S.W.2d 35, 41 (Mo. 1969). "It is a cardinal principle of interpretation that statutes *in pari materia* are to be treated as embodied in one section, and considered together in order to elucidate the legislative intent therein enacted, and this is true though they are found in different chapters of the revised statutes and under different headings." State ex rel. Brokaw v. Bd. of Educ. of City of St. Louis, 171 S.W.2d 75, 80 (Mo. App. 1943) (internal citations omitted).

The history of the enactment of subsections .2 and .3 of § 72.418 demonstrates that the General Assembly knew these subsections would apply only within St. Louis County. On March 23, 1993, this Court invalidated the Boundary Commission Act in O'Reilly v. City of Hazelwood, 850 S.W.2d 96, 99-100 (Mo. banc 1993). D10 p. 7. On May 19, 1993, the General Assembly passed Senate Bill 256, enacting subsections .2 and .3 of § 72.418. D10, pgs. 7-8. Subsection 2 provided that when a city annexed territory served by a fire protection district, 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" and provided that the fire protection shall not levy taxes in the annexed area thereafter. The phrases "simplified

boundary changes" and "boundary changes" used in subsections .2 and .3 are used exclusively in §§ 72.400 – 72.420, and appear in no other statutes.

Shortly before Senate Bill 256 was enacted, § 72.400.2 was amended to provide that §§ 72.400 – 72.420 shall apply within "any first class county with a charter form of government contain[ing] a population in excess of nine hundred thousand…." *See* Senate Bill 571 (1992). The General Assembly was therefore aware that by placing subsections .2 and .3 of § 72.418 within §§ 72.400 – 72.420, they would apply only to cities in St. Louis County, as St. Louis County was (and remains) the only county with a population over 900,000. D10 p. 12. The General Assembly was aware of this Court's decision in O'Reilly, and was aware that *a different procedure* was codified in § 321.322 addressing the same circumstances in all other counties aside from St. Louis County. When Senate Bill 256 was passed, § 321.322 existed in substantially its present terms and excluded cities within counties with over 900,000 inhabitants.

When § 72.418.2 was enacted, §§ 72.400 through 72.420 applied in counties which have established a boundary commission and have a population over 900,000. Section 321.322.1 applied in all counties *except* those with over 900,000 inhabitants. Accordingly, the General Assembly was well aware that § 72.418.2 targeted only cities in St. Louis County, and would apply nowhere else.

This is consistent with this Court's conclusion in South Metro. Fire Prot. Dist. v. City of Lee's Summit, 278 S.W.3d 659, 668-669 (Mo. banc 2009). The Court construed § 72.418 with the remainder of the Boundary Commission and concluded that it produces a different result than § 321.322. This does not mean that § 72.418 was not limited to cities in St. Louis County *prior* to South Metro. South Metro. didn't "narrow" § 72.418, but rather *construed* it and found that the legislature intended for § 72.418 to target only St. Louis County.

C. The Prohibition on Special Laws Does Not Just Apply to the Passage of Bills, but to the Enactment of Statutes with the Practical Effect of Targeting a Subclass.

Respondents assert, "[i]t is the actual passage of the bill that matters, under the Constitution. The bar is not on having "special laws"; it is on enacting them…." This is at odds with Missouri's special law jurisprudence, and the purpose of the prohibition on special laws.

In Treadway v. State, 988 S.W.2d 508, 511 (Mo. banc 1999), this Court examined whether statutes (§ 643.305, enacted in 1994 and § 307.366, most recently amended in 1997) passed by different bills and codified in different chapters constituted special legislation. Though the Court concluded those statutes were not special, it was not because they were enacted separately. It is the resulting regulatory scheme imposed by the myriad statutes at issue that this Court examined, not the manner of their enactment. Likewise, this Court had no difficulty declaring that two statutes enacted by Senate Bill 5 (2015) were special laws, though the bill enacted statutes applicable to the state as a whole. *See* Normandy, 518 S.W.3d at 188 (striking down §§ 67.287 and 479.359.2, RSMo. while retaining the provisions applicable statewide). No law holds that plaintiffs must challenge the entire bill enacting the offending statute(s), or challenge the manner of its enactment. It was not the manner of Senate Bill 5's enactment that made the statutes in Normandy special, but rather, the practical application of particular statutes to cities in St. Louis County. Similarly, it is the practical effect of §§ 72.418.2 and 321.322.3, rather than the manner of their enactment, that is at issue here.

DeSoto instructs that one must look to the "real effect" of a statute's application. 476 S.W.3d 288, n. 4. This was true long before Jefferson County was decided. *See* McKaig, 256 S.W.2d at 817 ("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.'" Internal citations omitted.).

The purpose of the bar on special legislation is to prevent inconsistent laws, applying to favored or disfavored areas of the state at the whim of special or local political interests. Such purpose would not be served by requiring that only the enactment of a bill could be challenged. Instead, the Constitution demands that the Court consider the real effect of enacted statutes, when read together and construed *in para materia*, to determine whether an impermissible division is thereby created. Requiring plaintiffs to challenge the enactment of a bill which may contain only part of a discriminatory regulatory scheme, rather than the statutes themselves – which when read in their totality divide a natural class – would thwart the objectives of art. III, § 40(30).

That is particularly true where, as here, the statutes are readily severable. The Boundary Commission Act could continue unimpeded if § 72.418.2 and .3 were stricken. Likewise, § 321.322.1 could apply to cities within St. Louis County if subsection 3 of § 321.322 were stricken. Since the District owns no real or personal property within the Annexed Area, and since the District has been fully compensated for its services since the annexation, there is no barrier to Crestwood's assumption of fire protection service within the Annexed Area in the manner contemplated by § 321.322.1. D10 p. 5.

D. Respondents Identify No Justification for Not Enacting a General Law, or Even a Law Applicable to the Other Charter Counties.

Respondents cite to an affidavit prepared by T.R. Carr ("Carr") to assert that §§ 72.418 and 321.322 were substantially justified. The 44-page report consists of conclusory characterizations regarding the nature of St. Louis County.

Respondents' reliance on Carr's report is premised on a mistaken view of special law jurisprudence. The test for substantial justification is not whether the statute is precisely tailored to the unique needs of one political subdivision. It is the very nature of a special law to be tailored to one political subdivision. Instead, to meet their burden, Respondents must show that a general law *could not* be made applicable. In other words, they must show that "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.'" Treadway, 988 S.W.2d at 511 (internal citations omitted). *See* Jefferson

County, 205 S.W.3d at 871 (the State argued that special law was justified due to "Jefferson County's suburban/rural mix … The state did not show, however, how Jefferson County's suburban/rural mix is significantly different from other counties."); *see also* O'Reilly, 850 S.W.2d at 99 (State relied upon "evidence [that] 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. [However,] respondents did not demonstrate a substantial justification for excluding other counties from choosing to have a boundary commission."). Even in 1926, it was recognized in Gentry v. Armstrong that:

> Any classification to take an act out of the constitutional prohibition, as to local and special laws, must be a classification based upon reasonable and sound grounds. That is, there must be a sound and reasonable basis for the classification. There are no doubt many congested centers in rural counties adjacent to our larger cities just as much in need of sewer systems as those rural centers in and near St. Louis, or any other city that might attain the population of 700,000. There are no doubt such urban centers near St. Joseph, Kansas City, Joplin, Springfield, and even cities of lesser population. Why leave these out and select only urban and rural centers in St. Louis county?

286 S.W. at 708. Respondents cannot rest on a showing that St. Louis County is unique, or else each county could claim entitlement to its own set of regulations tailored to their unique nature. Respondents must show that § 72.418.2 *could not* apply to the rest of the state (or even to the other charter counties). Conversely, they must demonstrate why § 321.322.1, the law applicable in Missouri's 113 other counties, could not apply to cities in St. Louis County.

Carr's report does not even attempt to do so. While it says much about St. Louis County, it offers virtually nothing about St. Charles or Jefferson County beyond bare facts about their populations and assessed valuations. In so doing, Carr implicitly concedes that 72% of Jefferson County residents reside in unincorporated areas, and would thus be dependent on fire protection districts. D28 pgs. 8, 18. This undercuts his rationale that because 77% of St. Louis County residents are served by fire protection

districts, special legislation is justified. D28 p. 4. Even still, Carr offers no explanation as to why a fire protection district would be superior to a municipal fire department or why annexing municipalities should be mandated to use legacy fire protection districts in St. Louis County, in perpetuity, while municipalities in every other county of the state are allowed to phase out the duplicate expense of fire protection districts over five years.

Carr offers no rationale whatsoever as to why cities in other counties could not be subject to § 72.418.2, nor does he explain why cities and fire protection districts in St. Louis County could not be subject to § 321.322.1. Since the boundary commission renders municipal annexation far more difficult, the insulation from annexation provided by § 72.418.2 is redundant. Carr does not even offer a rationale why § 72.418.2 could not have applied to Jackson, St. Charles, and Jefferson Counties. Thus, §§ 72.418.2 and 321.322.3 are not substantially justified for the same reasons this Court found in O'Reilly, 850 S.W.2d at 99.

Carr's observations should also be rejected because the Constitution requires that "whether a general law could have been made applicable is a judicial question to be judicially determined…." Springfield, 203 S.W.3d at 186. "[I]nterpretation of the meaning of legislative enactments is not a subject for expert testimony." Burke v. Moyer, 621 S.W.2d 75, 79 (Mo. App. W.D. 1981). Carr's opinion of the General Assembly's motives did not establish that a material fact is in dispute to warrant denial of summary judgment. "Conclusory allegations in affidavits are insufficient to raise questions of facts in a motion for summary judgment." Channing v. Brindley-Sullivan, Inc., 855 S.W.2d 463, 466 (Mo. App. E.D. 1993). Therefore, Respondents did not meet their burden to show substantial justification.

E. Appellants Did Not Waive a Claim Regarding Mo. Const. Art. III § 42

Respondents assert that Appellants are time-barred from invoking Mo. Const. Art. III, § 42 to rebut their claim that §§ 72.418 and 321.322.3 are substantially justified (and thus constitutional, even if special). Article III, § 42 states 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.

Respondents assert that such an argument is barred by § 516.500, RSMo., which requires that civil actions "alleging a procedural defect in the enactment of a bill into law" be commenced by the end of the following legislative session. This section is inapplicable because Appellants' challenge is not to the *procedure* by which the bills were enacted (such as an original purpose challenge or a single subject challenge), but rather relates to the *text* of the bills. Proof of publication of the constitutionally-required notice is absent from any of the bills at issue herein, a fact which Respondents do not dispute. D27 pgs. 22, 23, 26. A special law challenge involving art. III, § 42 is beyond the scope of § 516.500.

Here, Appellants did not make a direct claim that the bills enacting and amending the pertinent statutes fail because they violated art. III, § 42, though Appellants plead the General Assembly's non-compliance with this provision. D2 pgs. 14-15. Appellants claimed the statutes are special laws where general laws could be made applicable in violation of art. III, § 40(30). It is only to rebut Respondents' argument that the statutes are substantially justified that Appellants raise the General Assembly's non-compliance with art. III, § 42. Therefore, this is not a direct action challenging a procedural defect which could be barred by § 516.500. Appellants raise this issue as a "defense to the defense" rather than as a direct claim. This is appropriate because if "a law is facially special, the party defending the facially special law must demonstrate a substantial justification for the failure to adopt a general law instead." DeSoto, 476 S.W.3d at 287.

A ruling that a special law challenge is time-barred by § 516.500 would undercut this Court's pronouncements that the "general rule that legislation which is unconstitutional is void *ab initio* …." State ex rel. Pub. Def. Comm'n. v. County Court of Greene County, 667 S.W.2d 409, 413 (Mo. banc 1984). An unconstitutional special law does not become constitutional by operation of a state statute or the passage of time. To

hold otherwise would be to permit a statute to negate a constitutional provision. This is particularly true here, as the harm caused by §§ 72.418 and 321.322.3 continues far past the dates of their enactment. They remain special laws today as much as they were when enacted. Furthermore, the "interpretive canon of constitutional avoidance, [provides] that when 'a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [the Court's] duty is to adopt the latter.'" McPherson v. U.S. Physicians Mut. Risk Retention Group, 99 S.W.3d 462, 484 (Mo. App. W.D. 2003). A ruling by this Court upholding §§ 72.418.2 and § 321.322.3 as special laws that are substantially justified would implicitly concede that these statutes are fatally defective because the bills enacting these statues lacked the language mandated by art. III, § 42. This Court must not interpret §§ 72.418 and 321.322.3 in a manner that would concede that their enactments were unconstitutional. Accordingly, this Court must avoid a finding that these statutes are special laws that are substantially justified.

This Court should be mindful of the moral hazard that would be established by precluding this argument based on § 516.500. This Court "has repeatedly recognized that the time-bar set out in section 516.500 simply limits the time for bringing an action alleging a procedural defect in a bill's enactment. It does not purport to set out any time limit precluding a party from raising a bill's procedural defects as a defense to a claim. 'Under Missouri law, even though a claim may be barred by the applicable statute of limitations, the essence of the claim may be raised as a defense.'" Coop. Home Care, Inc. v. City of St. Louis, 514 S.W.3d 571, 582 (Mo. banc 2017) (internal citation omitted). If § 516.500 barred a special law challenge, the Court would be encouraging parties to disregard statutes they deem unconstitutional without judicial determination, and allow them to simply assert the defect rendering the statute unconstitutional as a defense.

If § 516.500 barred Appellants from directly claiming that §§ 72.418 and 321.322 were not enacted in conformity with art. III, § 42, Crestwood would be incentivized to ignore § 72.418 and await the inevitable lawsuit from the District seeking to compel payment. Appellants could then assert that no payment is due because the bills did not

comply with art. III, § 42, and are therefore void. This would be perfectly permissible based on such a holding. Yet the parties would be forced to deal with significant financial uncertainty while the courts consider the legalities of the statute at issue. The Court should not incentivize parties to take the law into their own hands and should not permit § 516.500 to bar Appellant's claims of non-compliance with art. III, § 42.

II. § 72.418.2 is a Special Law Regulating the Affairs of Cities.

Respondents argue that because fire protection is a police power of the state, it can be restricted by special law. This misapprehends art. III, § 40(21) and its prohibition on the enactment of a special law "regulating the affairs of counties, [or] cities…." If the General Assembly wants to revise its grants of authority to cities and fire protection districts to provide fire protection, it can do so, but only by general law.

As Respondents note, there are different means by which a city could provide fire protection service to its residents, including operating a municipal fire department, having no department and remaining within a fire protection district, or contracting with another entity. Yet Crestwood has no say in how it provides fire protection to part of the City. Crestwood, unlike cities in all other counties which engage in annexation, is stuck with the District, allegedly in perpetuity. This is what is forbidden by art. III, § 40(21). Respondents assert (under Points V and VII of their brief) that Crestwood could always discontinue its fire department or de-annex the Annexed Area. This argument gives the game away because it shows that cities in St. Louis County are limited in ways not applicable to all other cities. Annexation is a permissible activity for cities to engage in throughout the state. When a city with a fire department annexes territory served by a fire protection district, § 321.322.1 provides a framework to govern the transition.

Sections 72.418 and 321.322.3 exist to make annexation of fire protection district territory in St. Louis County financially unsustainable, and to ensure that the fire protection districts retain their power and have a guaranteed ability to collect tax revenue, regardless of the peoples' wishes. If this was good policy, it would be good policy for the entire state. These statutes are special laws that regulate the affairs of cities in St. Louis

County by limiting how cities can provide fire protection service, and making annexation of fire protection district territory untenable. Cities in all other counties can engage in annexation of fire protection district territory without being saddled with crippling, escalating costs in perpetuity. Yet fire protection districts in St. Louis County are afforded special protection from annexation. This grant of a permanent right for fire protection districts to retain their jurisdictions has the effect of locking existing borders into place, thereby enabling the well-documented fragmentation of St. Louis County governments with which the region continues to struggle. The presence of special laws that regulate the affairs of cities in St. Louis County stand in the way of addressing the problems caused by fragmentation. When annexation is made so difficult, it should not surprise us that St. Louis County remains one of the most fragmented and divided metropolitan areas in the nation. Which is precisely why, if the General Assembly intends to regulate the affairs of cities, it must regulate the affairs of *all cities*. Because that is not what the General Assembly has done with §§ 72.418.2 and 321.322.3, these statutes violate art. III, § 40(21).

III. § 321.322.3 is a Special Law and a General Law Could Apply.

Respondents claim that § 321.322.3 is a general law under the pre-Jefferson County jurisprudence, which they claim permitted narrow population characteristics applicable to only one political subdivision, and that this ends the inquiry. This runs expressly counter to DeSoto's proclamation that Jefferson County was not a break with prior case law and that the Court must look to the "real effect" and "practical operation" of statutes, regardless of when they were enacted. By setting an absurdly high population floor of 900,000 (and setting no ceiling), the General Assembly made sure that no city outside of St. Louis County will be excluded from § 321.322.1, and St. Louis County cannot grow its way out of the classification.

No other county has anywhere close to 900,000 residents, and no remotely plausible forecast would provide that any county will have 900,000 at any time in the future. D10, p. 12. While some pre-Jefferson County cases suggest that narrow

population classifications which will clearly only apply to one political subdivision are permissible, these holdings were never on the firm ground that Respondents suggest.

School Dist. of Riverview Gardens v. St. Louis County, 816 S.W.2d 219, 220 (Mo. banc 1991), was frequently invoked for the proposition that population classifications are open-ended, but that case involved a statute requiring voter approval for certain political subdivisions ("'those the greater part of which is located in first class charter counties adjoining any city not within a county or any city not within a county'") to adjust their tax levies. Riverview Gardens did not address a population classification at all. Riverview Gardens stated in *dicta* that population *could* be an appropriate criteria for classifying political subdivisions where such criteria "allows the legislature to address the unique problems of size with focused legislation; it also permits those political subdivisions whose *growth or decline* brings them into a new classification the advantage of the legislature's previous consideration of the issues facing similarly situated governmental entities." Id. Emphasis added. Since cities in other counties cannot grow their way into § 321.322.3 – and St. Louis County cannot decline its way out – § 321.322.3 is not open-ended.

Walters v. City of St. Louis, 259 S.W.2d 377, cited in Riverview Gardens as authority to permit narrow population classifications, likely represents the furthest this Court has gone to accept a narrow population classification applying to only one entity. A careful review reveals it to be an outlier. Walters involved a city ordinance imposing an earnings tax. Id. at 379. The ordinance was enacted pursuant to § 92.110, RSMo, which permitted cities with over 700,000 inhabitants to enact the tax. Section 92.110 was set to expire on April 1, 1954, applied only to the City of St. Louis, and it was conceded that no city would reach a population of 700,000 prior to its expiration. Id. at 380-381. Section 92.110 was enacted because the statute permitting St. Louis's existing earnings tax was set to expire. Id. at 380. This Court permitted the population classification of 700,000 because ruling that the statute was special would "deny to the General Assembly the right to authorize for a limited period of time the City of St. Louis to enact an emergency earnings tax ordinance likewise so limited solely because its population was so far in

excess of that of any other city that none would come within the classification during the emergency." Id. at 383.

In other words, Walters permitted a population range applicable to only one city (the City of St. Louis, which the Constitution recognizes as a constitutionally unique entity and a class unto itself) to retain its existing earnings tax, authority for which would otherwise expire, to preclude a fiscal emergency. The statute did not grant a right to one city and deny it to others, and this is critical to Walters. "The act still does not exclude any city that *may* come within the classification therein made during its effective existence; to the contrary, it expressly includes any such city." Id. at 384. The statute permitted the City of St. Louis to enact an earnings tax while not denying that ability to other cities. Even if it had denied that authority to other cities, the statute's temporary nature would make such prohibition temporary. Indeed, Kansas City was later granted authority to adopt an earnings tax. *See* § 92.210, RSMo (enacted in 1963 and now repealed). Had the statute in Walters authorized one city to enact the tax and denied that ability to all others – and had that statute been a permanent act enshrining such prohibition in perpetuity – the result in Walters would likely have been different.

Walters partially overruled Reals v. Courson, 164 S.W.2d at 310, which held that a statute applicable only to a county with between 200,000 and 450,000 inhabitants was unconstitutional because "the law in question applies to school districts in St. Louis County only and could or even should be equally applicable to other counties, it includes less than all other counties and school districts similarly situated and is therefore special and violative of the Constitution." Yet Walters noted that all "the cases cited in support of the conclusion reached in the Reals case deal with legislative acts that are *to continue in perpetuity* unless repealed. They are soundly ruled. It is obvious that limitation of the operation of an act that is to continue in perpetuity to a certain city or cities then comprising a specified classification without leaving it open to operate upon all cities thereafter attaining the same classification, thereby resulting in the possibility of the act becoming applicable to some one or more, but not all, of the same classification, would be to deprive the latter of its benefits." Walters, 259 S.W.2d at 383. Emphasis added.

It was critical in Walters that no city similarly situated to St. Louis was being denied any rights by § 92.110, and that the statute did not last in perpetuity. Here, §§ 72.418.2 and 321.322.3 last in perpetuity and deprive cities in St. Louis County of rights and abilities enjoyed by cities in other counties. Therefore, to the extent that Walters sanctioned an unreasonably high population classification which no other city would ever reach, Walters and its progeny are inapposite to the facts in the case before this Court today.

This Court has, both before and after Jefferson County, examined the real effect of statutory criteria in determining whether a statutory scheme is special by subdividing similarly situated entities and subjecting them to different laws. DeSoto mandates that this Court not simply apply certain of its pre-Jefferson County jurisprudence and find that a population classification is *ipso facto* open-ended. When one looks at the real effect of the population floor in § 321.322.3, it is plain to see that it creates one law for cities in St. Louis County (§ 72.418.2) and another for cities in all other counties (§ 321.322.1), and that the classification can never change.

Respondents ignore Appellants' arguments about the pre-2017 version of § 1.100, RSMo. Even prior to the 2017 amendment, § 1.100 provided that a statute with a population classification applied to entities within the classification "at the time the law passed." Accordingly, St. Louis County could not shrink out of § 321.322.3's range because it had the requisite population at the time the law passed. The 2017 amendment was occasioned because of Matter of Missouri-Am. Water Co., 516 S.W.3d 823, 828 (Mo. banc 2017), in which this issue was addressed. While the Court considered whether a county could drop out of a range by population loss, "this Court cannot reach" that issue" because the case was moot. Id. The 2017 amendment to § 1.100 only clarified what already true: that a county that was within a population classification "at the time the law passed" does not drop out when it loses population.

This Court should find that § 321.322.3 is unconstitutional, sever it for the statute and enjoin its enforcement.

IV. The Payment to The District is a Tax.

Respondents contend, in response to Appellants' Points IV, V, VI, and VII, that the payment mandated by § 72.418.2 is not a tax, but an "intergovernmental payment." An examination of the factors set forth in Keller v. Marion County Ambulance Dist., 820 S.W.2d 301, 304, n. 10 (Mo. banc 1991) shows that this argument is misplaced.

"When is the fee paid?" – The payment mandated by § 72.418.2 occurs annually, and not in response to the provision of service by the District.

"Who pays the fee?" – All Crestwood taxpayers are responsible for a proportionate share of the payment, regardless of whether they set foot in the District's territory or use its services.

"*Is the amount of the fee to be paid affected by the level of goods or services provided to the fee payer?"* – The payment is based on the property assessments within the Annexed Area.

"*Is the government providing a service or good?"* – Crestwood residents are not receiving a service or good. Those within the Annexed Area have the ability to use the District's services.

"*Has the activity historically and exclusively been provided by the government?"* – Fire protection is historically a governmental function.

Each of these five factors weigh in favor of the payment being a tax rather than a fee (or an "intergovernmental payment," a heretofore unrecognized term). The only difference is that under § 72.418.2, Crestwood is responsible for collecting the money from its taxpayers and paying it to the District instead of the District directly billing Crestwood residents for their proportionate share of its taxes. *See also* City of Hazelwood v. Peterson, 48 S.W.3d 36, 40 (Mo. banc 2001), *overruled on other grounds*, Zweig v. Metropolitan St. Louis Sewer District, 412 S.W. 3d 223 (Mo. banc 2013).

This unusual arrangement makes the tax protest procedure in § 139.031, RSMo unavailing for Appellants Roby and Hoeing. There is no line item on their tax bills representing a payment by Crestwood to the District because they don't pay the tax directly to the District. The protest statement required by § 139.031.1 requires taxpayers

to "include the true value in money claimed by the taxpayer if disputed." Since the payment is based on the assessed valuation within the Annexed Area, taxpayers would have no idea how much of their taxes they are protesting. Crestwood doesn't collect the tax directly, but must still make the payment to the District from the revenue it collects from property tax, sales tax, and other revenue sources. Any complaint that Roby and Hoeing could make about this arrangement to their elected officials would be unavailing because no Crestwood official can alter this arrangement. This, coupled with the fact that the General Assembly has no inclination to address a local problem, renders § 72.418.2 especially pernicious.

Similarly, an election contest challenge to the District's tax increases in 2012 and 2017 would be unavailable to Crestwood residents. Section 115.553, RSMo. limits those who could file an election contest to "one or more registered voters from the area in which the election was held." Since Roby and Hoeing do not reside in the District's territory, they cannot challenge the election, and their claims under Count VI are not barred for failure to do so.

Respondents claim that "Roby and Hoeing did not allege, and have presented no evidence, that the City of Crestwood increased its property tax levy, or the rate of any other tax, since the 1997 annexation of the area served by the" District. Respondents' Brief, p. 42. This is irrelevant. The money to pay the District does not materialize out of thin air. It must be collected by Crestwood. In fact, shortly before this lawsuit was filed, Crestwood did just that, enacting a 45-cent property tax increase at the April 4, 2017 election. It is indisputable that the revenue paid to the District could be used by Crestwood to address other pressing needs.

This Court should determine that money paid by Crestwood to the District is tax revenue, and treat it as such for purposes of Counts IV, V, VI, VII.

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 July 1, 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 7,744, 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*