BEFORE THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

RONALD CALZONE,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 15AC-CC00247
	)	
STATE OF MISSOURI et. al.,	)	
	)	
Respondents.	)	

TRIAL BRIEF

Respondents, Chris Koster, Missouri Attorney General, Richard Fordyce, Director of Department of Agriculture, Kevin Keith, Director of Department of Transportation, Nia Ray, Director of Department of Revenue, Margie Vandeven, Commissioner of Department of Elementary and Secondary Education, and Peter Lyskowski, Director of the Department of Health and Senior Services, ("Respondents"), by and through undersigned counsel, hereby submit the following trial brief:

STANDING

Standard

"[P]arties seeking relief bear the burden of establishing that they have standing." *Schweich v. Nixon*, 408 S.W.3d 769, 774 (Mo. 2013). "[S]tanding cannot be waived." *CACH, LLC v. Askew*, 358 S.W.3d 58, 61 (Mo. 2002). Courts "determine standing as a matter of law on the basis of the petition

and the undisputed facts." *White v. White*, 293 S.W.3d 1, 8 (Mo. App. W.D. 2009).

"Standing is a necessary component of a justiciable case that must be shown to be present prior to adjudication on the merits." *Schweich v. Nixon*, 408 S.W.3d 769, 774 (Mo. 2013). "A justiciable controversy exists where [1] the plaintiff has a legally protectable interest at stake, [2] a substantial controversy exists between parties with genuinely adverse interests, and [3] that controversy is ripe for judicial determination." *Id.* at 773. "The first two elements of justiciability are encompassed jointly by the concept of 'standing.'" *Id.* at 774. The standing doctrine serves "the purpose of preventing parties from creating controversies in matters in which they are not involved and which do not directly affect them." *Id.* (*quoting CACH, LLC v. Askew*, 358 S.W.3d 58, 61 (Mo. 2002)).

"The issue is whether plaintiff has a pecuniary or personal interest directly at issue and subject to immediate or prospective consequential relief." *Schweich*, 408 S.W.3d 769, 775. "A party establishes standing, therefore, by showing that it has some legally protectable interest in the litigation so as to be directly and adversely affected by its outcome." *Id.*

Citizen Standing

Petitioner asserts two types of standing, the first essentially being citizen standing. He bases this upon two sources. The first, based upon

Section 116.190, RSMo. That statute applies to "Any citizen who wishes to challenge the official ballot title or the fiscal note prepared for a proposed constitutional amendment." Section 116.190.1., RSMo. That statute does not apply here.

Missouri case law demonstrates the opposite of what Petitioner asserts with regard to citizen standing. "Generally, an individual does not have standing to seek redress of a public wrong, or of a breach of public duty, if such individual's interest does not differ from that of the public generally, even though the complainant's loss is greater in degree than that of other members of the public." *Hinton v. City of St. Joseph*, 889 S.W.2d 854, 859 (Mo. App. 1994). Petitioner takes issue with the word "generally," but provides no authority that an exception to the rule stated in *Hinton* applies. To assert standing, Petitioner is to show a "special injury," that is, has injuries that are "different than the injuries which would be suffered by the public as a whole." *Ours v. City of Rolla*, 965 S.W.2d 343, 345 (Mo. App. S.D. 1998). Petitioner has demonstrated nothing to indicate that any injury to him as a result of S.B. 672 is any different than the average citizen.

Petitioner asserts that his status as a legislative watchdog, in other words, a lobbyist, somehow sets him apart from the average citizen. However, both Bev Ehlen and Ike Skelton testified that to be a lobbyist, they do not need any specific credential and only have to pay a small, ten dollar,

fee. To be a lobbyist merely requires residency in Missouri and an interest in the legislative process. This is far from "showing that [he] has some legally protectable interest in the litigation so as to be directly and adversely affected by its outcome." *Schweich*, 408 S.W.3d at 769. In reality, Calzone's interest in this legislation "does not differ from that of the public generally" and his injuries are not "different than the injuries which would be suffered by the public as a whole." *Hinton*, 889 S.W.2d at 859; *Ours*, 965 S.W.2d at 345.

Petitioner relies on *Lebeau v. Commissioners of Franklin Co.*, 422 S.W.3d 284, 288 (Mo. banc 2014) as authority for citizen standing. But the very quote Petitioner chose states that the case is addressing "taxpayer standing." *Id.* Petitioner also suggests that requiring an injury to create standing would allow nobody to challenge an unconstitutional law. However, anyone who is injured by this bill could have challenged it. For example, a builder of one-or two-family dwellings or townhouses could challenge this bill based on Section 67.281. An auctioneer, druggist, hawker, etc. could challenge this bill based upon Section 94.270. However, nowhere in this bill does the legislature regulate, tax, or in any way affect "legislative watchdogs."

Taxpayer Standing

Petitioner also asserts that he has taxpayer standing. Pet. 3, ¶ 8. To establish taxpayer standing, "a taxpayer must establish that one of three conditions exists: (1) a direct expenditure of funds generated through taxation; (2) an increased levy in taxes; or (3) a pecuniary loss attributable to the challenged transaction of a municipality." *Manzara v. State*, 343 S.W.3d 656, 659 (Mo. 2011). "[A] direct expenditure of public funds generated through taxation is a sum paid out, without any intervening agency or step, of money or other liquid assets that come into existence through the means by which the state obtains revenue required for its activities." *Manzara*, 343 S.W.3d at 660.

Prongs two and three are not controlling in this case because Petitioner did not allege tax increases or pecuniary loss. With regard to the first prong, Petitioner did nothing to prove that this legislation would constitute "a direct expenditure of public funds." "Allegations and proof of the illegal expenditure of public funds or the prospect of such illegal expenditures is an essential element to grant taxpayer standing." *Ours*, 965 S.W.2d *citing Worlledge v. City of Greenwood,* 627 S.W.2d 328, 331 (Mo. App. W.D. 1982). "Mere filing of a lawsuit does not confer taxpayer standing." *Manzara*, 343 S.W.3d at 659. Petitioner has only established that the legislative oversight committee created a fiscal note. Specifically, that fiscal note states the bill's "*estimated*

net effect on *other state funds*." Pet. Ex. 9. (Emphasis added). Chris Kelly, who at a time oversaw the Legislative Oversight Committee, even testified that this is an *estimated* sum. He was unable to testify as to any portion of the bill that authorized any expenditure. Section 249.424, which Kelly did mention, can create a fund if there is "approval by a majority of voters." It is conditioned upon an election. He testified that, while it is possible that this bill will result in state expenditures, it is also possible that this bill will not result in state expenditures. All that is established by Plaintiff's evidence is the "estimated net effect."

Two cases are illustrative on why the "estimated net effect" is insufficient. First, in *Tichenor v. Missouri State Lottery Com'n*, 742 S.W.2d 170, 172 (1988), the Missouri Lottery Commission attempted to include Missouri in a multi-state lottery. The expectation was that this program would result in a "net gain." *Id.* The Lottery Commission was authorized by the new law to spend 10% of its proceeds for "expenses." *Id.* Despite the fact that Missouri's revenue would result in a "net gain" and "no money will be taken from the state treasury," the Court found that the 10% allocated to expenses constituted "state funds" and, therefore, found taxpayer standing for the Petitioner. *Id.*

The analysis in *Manzara* was essentially the opposite. There, the Court stated that tax credits and expenditures "might be compared in that

their end result is 'less' money in the state treasury." *Manzara*, 343 S.W.3d at 660. However, the tax credits in *Manzara* were determined not to confer taxpayer standing because "taxpayer standing is to give taxpayers a way to conform government spending to the law [and] that purpose is not served if the State is *spending nothing*." *Id.* (emphasis added).

Both cases stand for the proposition that the net effect of law does not establish taxpayer standing. What is important for taxpayer standing is whether the state spends money. Here, Petitioner has merely established an "estimated net effect," but does not identify any part of SB 672 that authorizes state funds to be allocated to the programs referenced in SB 672. By establishing an estimated negative net effect to state agencies, and nothing more, Petitioner has not proven the facts necessary to establish that SB 672 will result in a "sum paid out." *Manzara*, 343 S.W.3d at 660. Because Petitioner has failed to meet his burden that this bill will authorizes the allocation of state funds created by SB 672, Petitioner has failed to establish taxpayer standing. Accordingly, judgment must be entered in Respondents' favor and no further inquiry is necessary.

CONSTITUTIONAL CHALLENGES UNDER ARTICLE III, SECTIONS 21 & 23

Petitioner has alleged violations of Article III, Section 21 and Article III, Section 23 of the Missouri Constitution, claiming that SB 673 changed in purpose, that the finally passed version contained multiple subjects, and that the finally passed bill had changed in title. With regard to challenges to state statutes, Missouri Courts are to presume "that a statute is valid and will not hold it to be in violation of the constitution unless it clearly contravenes a constitutional provision." *Bone v. Dir. Of Rev.,* 404 S.W.3d 883, 886 (Mo. *banc* 2013) citing *F.R. v. St. Charles Cnty. Sheriff's Dep't*, 301 S.W.3d 56, 61 (Mo. banc 2010). "A person challenging the constitutional validity of a statute must meet his burden of proof by demonstrating that the act clearly and undoubtedly violates the constitution." *Id.*

Original Purpose

With regard to the original purpose, Petitioner's reasoning is limited and insufficient. Article III, Section 21 states that "no bill shall be so amended in its passage through either house as to change its original purpose." Petitioner asserts that "the original purpose 'relating to county prosecutor' is clearly different than the final purpose of 'relating to political subdivisions….'" Pet. Brf. 9. Petitioner does not, however, make any assertions as to how the purpose of the bill changed. He only asserts that its

title changed. Despite Petitioner's claim to the contrary, Article III, Section 21 does not contain any prohibition on changing the title of the bill. It is Petitioner's burden to "demonstrate" that SB 672 violates Article III, Section 21, but he has failed to do so.

Single Subject

Petitioner's next claim, violation of the single subject provision, similarly fails to "demonstrate" a constitutional violation. He argues "that SB 672's title was changed, in itself, is prima facie evidence that…additional subjects were added." Pet. Brf. 10; Article III, Section 23, similarly does not prohibit the changing of a bill's title, only that the bill, as ultimately enacted, cannot "contain more than one subject which shall be clearly expressed in its title." "The test for whether a bill violates the single subject rule is 'whether the bill's provisions fairly relate to, have a natural connection with, or are a means to accomplish the subject of the bill as expressed in the title.'" *Mo. Roundtable for Life v. State*, 396 S.W.3d 348, 351 (Mo. banc 2013), *citing Mo. Health Care Ass'n v. Att'y Gen. of the State of Mo.,*953 S.W.2d 617, 622 (Mo. banc 1997). "This test focuses on the title of the bill to determine its subject rather than the relationship between the individual provisions." *Id*., *citing C.C. Dillon Co. v. City of Eureka,* 12 S.W.3d 322, 328 (Mo. banc 2000). SB 672's title, as passed, specifically titles the bill as "An Act to repeal sections…and to enact…new sections relating to political subdivisions." The

language of this title encompasses all of the different provisions of the bill. Petitioner has failed to "demonstrate" how the title is inconsistent with the provisions of the bill. Accordingly, SB 672 does not violate Article III, Section 23.

Changed Title

Petitioner fails to state a claim for which relief can be granted. Article III, Section 21 and Article III, Section 23 do not contain prohibitions on changing the title of a bill. Petitioner provides no authority that indicates this to be the case.

Special Laws

Because Petitioner has failed to demonstrate that SB 672 is unconstitutional on procedural grounds, Petitioner's special laws allegations must next be addressed. However, Petitioner failed to allege, or prove, the facts necessary to create standing for any of the individual sections which he asks this court to find to be special laws. Petitioner resides in Dixon, which is in Pulaski County. The six statutes referenced in the Senate Research Bill Summary state that the citizens affected would be from Jefferson County, Savannah, St. Charles, Harrisonville, Flordell Hills, Edmundson, and St. Louis. Petitioner is not a citizen or taxpayer of any of those counties, cities, or municipalities. Additionally, Petitioner addresses a section that involves Highway 63, State Route WW, and State Route J. However, Petitioner did

nothing to establish that those physical locations are within Dixon or Pulaski County. Petitioner lacks standing to address any of the laws that he claims are special laws.

Special laws analysis can be divided into two categories: closed-ended and open-ended. *City of Desoto v. Nixon,* 2016 WL 142676, 3 (Mo. *banc* 2016). "A law that is based on closed-ended characteristics, such as historical or physical facts, geography or constitutional status, is facially special because others cannot come into the group nor can its members leave the group." *Id. citing Tillis v. City of Branson*, 945 S.W.2d 447, 449 (Mo. *banc* 1997). These "facially special" laws are the laws which require substantial justification by the defending party. *Id.*

Open-ended characteristics, not facially special, require a different analysis and are presumed to be constitutional. *Id. citing O'Reilly v. City of Hazelwood*, 850 S.W.2d 96, 99 (Mo. *banc* 1993). Population classifications are open-ended because the targeted locality can fall out of the classification and others can fall into it. *Id. citing Tillis*, 945 S.W.2d at 449. Open-ended laws such as these do not violate Article III, section 40. *Id. citing Jefferson Co. Fire District Ass'n v. Blunt*, 205 S.W.3d 866, 870 (Mo. *banc* 2006).

The six provisions of SB 672 referenced in Paragraph 39 of Petitioner's brief are open-ended. The Sections identifying the characteristics for the six provisions are as follows:

> Section 67.320
> …with a charter form of government and with more than two hundred thousand but fewer than three hundred fifty thousand…
>
> Sections 79.130 & 79.135
> "In any city of the fourth classification with more than five thousand but fewer than six thousand inhabitants and located in any county of the third classification without a township form of government and with more than sixteen thousand but fewer than eighteen thousand inhabitants…"
>
> Section 192.310
> "…any home rule city with more than sixty-four thousand but fewer than seventy-one thousand inhabitants…
>
> Section 321.322
> "…shall be included within a city having a population of at least two thousand five hundred but not more than sixty-five thousand…
>
> Section 94.270
> …city of the fourth classification with more than eight hundred but less than nine hundred inhabitants and located in any county with a charter form of government with more than one million inhabitants shall…

An open-ended law is presumed constitutional. *City of DeSoto*, 2016 WL 142676 at 4. To rebut that presumption, the person challenging the law has to address three criteria:

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;

3) The population range is so narrow that the only apparent reason for the narrow range is to target a particular political subdivision to exclude all others.

Id. citing Jefferson County, 205 S.W.3d at 870-71. Petitioner's evidence, and his brief, do address number 1, in that, he has indicated that the population ranges only apply to one political subdivision. However, his evidence does not indicate that there are other political subdivisions of similar size that are not included. No population or classification data regarding other political subdivisions was even introduced. Additionally, Petitioner's evidence does not address the question as to whether "the only apparent reason" for the range is to target a particular political subdivision. To find that the second and third prongs have been met would require this court to speculate. Because open-ended laws are presumed constitutional, and because Petitioner failed to meet the three criteria laid out in *Jefferson County*, these six laws are not special laws.

Petitioner next contends that Section 135.980.2 is a special law because it is limited to a "city not within a county," that being St. Louis City. However, "adding St. Louis City to an otherwise open-ended law does not render [a statute] a special law." *Zimmerman v. St. Tax Comm'n of Mo.*, 916 S.W.2d 208, 209 (Mo. *banc* 1996). There is no other closed-ended description in Section 135.980, meaning, it is otherwise open-ended. More recent

opinions have explicitly mentioned *Zimmerman*, carefully avoiding overturning the precedent. *See e.g. Jefferson County*, 2015 S.W.3d at FN6. "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 within the meaning of article III, section 40." *Id.*

Petitioner next addresses Section 304.190.3(4), which combines a population description with physical descriptions of roads and a highway. However, the provision cited by Petitioner, which SB 672 creates, is an exception to open-ended law. Section 304.190.3 states:

> 3. The "commercial zone" of the city is defined to mean that area within the city together with the territory extending one mile beyond the corporate limits of the city and one mile additional for each fifty thousand population or portion thereof provided, however:
>
> ***
>
> (4) The commercial zone of a home rule city with more than one hundred eight thousand but fewer than one hundred sixteen thousand inhabitants shall extend north from the city limits along U.S. Highway 63 for eight miles, and shall extend east from the city limits along State Route WW to the intersection of State Route J. and continue south on State Route J. for four miles.

The statute, when taken as a whole, is an open-ended law, with a closed-ended exception. The commercial zone definition excludes the city described in Section 304.190.3(4). It does not single out that city, so as to only apply to

that single city. Because the law itself is an open-ended law with a closed-ended exception, the law should be treated as open-ended. Additionally, the three-pronged criteria set out in *Jefferson County* should apply. Petitioner has not provided evidence for prongs two and three, therefore, Section 304.190 should pass constitutional scrutiny.

Finally, Petitioner proposes that the legislature should provide notice to the affected subdivisions. However, Article III, Section 42 only requires that notice be provided when a local or special law is passed. For the above stated reasons, the laws at issue are not unconstitutionally local or special; therefore, notice is not required.

Severability

If this court were to find SB 672 unconstitutional, it should sever the unconstitutional provisions. Courts are to presume severability. *St. Louis Co. v. Prestige Travel*, 344 S.W.3d 708, 716 (Mo. *banc* 2011). There are two separate types of severability. For the first, when a bill is unconstitutional for procedural reasons, the Court should keep provisions of the bill alive if "beyond a reasonable doubt, the bill would have become law." *Missouri Roundtable for Life*, 396 S.W.3d at 354. In *Hammerschmidt v. Boone Co.*, 877 S.W.2d 98, 104 (Mo. *banc* 1994), that meant "divining the primary subject" of the bill. Here, the primary subject was a prosecutors bill. The Senate journals indicate that the bill, before moving to the house, and before being

renamed to include "political subdivisions," passed the senate 28-0. There is no indication that the prosecutor bill, which included Sections 56.067, 56.265, 56.363, 56.807, and 56.816, standing alone would have failed to pass both houses.

As for substantive severance, Section 1.140 states:

> The provisions of every statute are severable. If any provision of a statute is found by a court of competent jurisdiction to be unconstitutional, the remaining provisions of the statute are valid unless the court finds 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.

SB 672 amends, replaces, or adds separate and distinct bills. While all can fall under "political subdivisions," the bill contains thirty three separate statutory sections that stand alone and independent of each other. If any section of this bill is found to violate the special laws provision of the Missouri Constitution, the other sections are separate and distinct, not essentially and inseparably connected. All other sections should remain intact.

Finally, as a matter of policy, sections which could have been relied upon by the citizens of Missouri should also be severed. To declare the

sections unconstitutional would be to potentially complicate matters for someone who was relying on the relevant statutes. Section 339.531 creates a process by which citizens can make complaints to the Missouri Real Estate Appraisers Commission. If a citizen has made a complaint to the Commission since the enactment of this bill, what procedure will the Commission follow? Section 348.407.5 allows the Missouri Agricultural and Small Business Authority to make grants, loans, or loan guarantees to Missouri businesses. If a grant, loan, or loan guarantee has been made since the enactment of this bill, there may be ramifications for both the Authority and the business. Section 408.040 allows interest to accrue on garnishments. If the bill is void, would there be interest on those garnishments imposed since August 2014? Section 525.040 creates priorities for garnishments. Again, if a garnishment has been imposed since August 2014, would those priorities still exist? This court should sever any portion of the bill that could have been relied upon by the Missouri citizens.

Conclusion

Because Missouri does not recognize citizen standing, and because Petitioner has not proven taxpayer standing, Judgment should be found in favor of the Respondents. If standing is found, Petitioner has failed to "demonstrate" that SB 672 is procedurally unconstitutional or that the bills contain special laws. Finally, if constitutional violations are found, this Court should sever the bill, retaining all portions of the bill that were the primary subject of the bill, any portion of the bill not to be found a special law, or any portion of the bill that could have been relied upon by the Missouri citizens.

WHEREFORE, Respondents respectfully request that the Court dismiss the entire petition in this case or otherwise for such other and further relief as is just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served via electronic mail, on this 22nd day of January, on the following:

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/s/ Curtis Schube
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