IN CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

ST. LOUIS COUNTY, MISSOURI, et al.,	)	
Plaintiffs,	)	
v.	)	Case No. 04CV323913
STATE OF MISSOURI,	)	
Defendant.	)	

State's Reply Suggestions in Support of the State's Motion for Summary Judgment

The State's motion for summary judgment demonstrated that this is the wrong lawsuit, at the wrong time, filed by the wrong plaintiffs, against the wrong defendant. Now, Plaintiffs – at page 9 of their Response – concede precisely this point:

> "Plaintiffs, then, are not concerned about a suit filed against it by the State. [W]hat concerns Plaintiffs is the palpable threat of suit by persons seeking to file applications, or by persons seeking to prevent the use of County funds to pay for the processing."[1]

Exactly.

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[1] Of course, Plaintiffs nowhere allege either that anyone in the County has sought a concealed weapons permit, or that the County Sheriff (or other appropriate official under the County Charter) has refused or would refuse such a request. If we can assume that the County Sheriff is already refusing to issue permits, then suits by frustrated applicants (if any) do not seem to be materializing, and suits by those seeking to prevent the issuance of permits are unnecessary.

As Plaintiffs now admit, there is no justiciable controversy between the State and Plaintiffs. Simply titling a pleading as a "declaratory judgment" does not give Plaintiffs license to attempt to pre-empt lawsuits by third parties (which suits will not be filed against the Plaintiffs anyway, but rather against whichever county official is issuing – or refusing to issue – those permits) by setting the State up as the "strawman" defendant.

I. The Issues On Which Plaintiffs Seek This Court's Ruling

A. ***Which county official is responsible for issuing (or, apparently, for refusing to issue) concealed weapons permits?*** As demonstrated in the State's opening brief, there is uncertainty over this issue because there are at least three county officials who, as a function of the county Charter, may have this responsibility: the Sheriff, the Superintendent of the County Police Department, or the Director of Judicial Services. This uncertainty can and should only be resolved in litigation brought by a plaintiff with some legitimate stake in the outcome, against defendant(s) (likely, the three officials just named) who also have a proper stake in the outcome, presenting a live controversy ripe for judicial resolution. All of these factors are missing in the present case.

B. ***Does the County need to exercise – or at least consider – the "delegation option" under § 571.101.12 before raising a Hancock Amendment defense in support of its refusal to issue concealed weapons permits?*** The County claims to fear a lawsuit by a frustrated applicant seeking concealed weapons permit. *See* Plaintiffs' Response at 9. But none of the Plaintiffs would even be proper defendants to such a suit. Such a suit,

in the hypothetical event it is ever brought, must be brought against the Sheriff who is refusing to issue the permit (or, as noted above, one of the other officials who may, under the Charter, have this responsibility). Such a suit certainly will not be brought by or against the State. In this hypothetical suit by this hypothetical plaintiff, the proper defendant (whoever he or she may be) may wish to raise the Hancock Amendment as a defense to an action seeking to compel the issuance of a permit. If so, the hypothetical plaintiff might argue – as the Supreme Court suggested in *Brooks v. State,* 128 S.W.3d 844, 850 (Mo. banc 2004) – that the sheriff could "defer most, if not all" of his or her costs associated with concealed weapons applications by delegating the responsibility for these applications to local police chiefs . . . thereby avoiding the "unfunded mandate" prohibited by the Hancock Amendment. Then, assuming we can forecast even further down the hypothetical chain of events in this hypothetical lawsuit between persons none of whom are parties in this lawsuit, the hypothetical defendant Sheriff (or other appropriate official under the Charter) may argue that St. Louis County, as a "charter county," cannot avail itself of options offered by the General Assembly to "counties of the first classification," as was done in the "delegation option" provisions in § 571.101.12. Presumably, by this time, he or she would have determined that St. Louis County is willing to live by this position and forego the many other statutory provisions authorizing actions for "counties of the first classification." If all of these speculative steps occur, then that lawsuit – but only that lawsuit – would be a proper forum for

resolving the issue Plaintiffs seek to insert in this case. Such a suit – but only such a suit – would present proper plaintiffs, proper defendants, and live controversy ripe for judicial resolution. All of these factors are missing in the present case.

II. Plaintiffs Cannot Meet the Legal Standard for a Justiciable Controversy

The State's opening brief demonstrated that certain plaintiffs lacked standing to assert their Hancock Amendment claims, and that no plaintiff had demonstrated a present, live controversy over which this Court may legitimately assert subject matter jurisdiction. These two issues, standing and ripeness, are two elements of the overarching legal requirement of justiciability.

Missouri courts have written extensively on the need for lawsuits – even those styled as seeking "declaratory judgments" – to be brought by plaintiffs with an actual, personal stake in the outcome, against proper defendants raising claims about which there is a present, live controversy. No extended analysis of those cases is necessary, as the Court of Appeals has already provided one:

> [D]espite the broad language of the statute and rule, courts are limited in the circumstances in which they may properly issue a judgment. For the court to have jurisdiction, even in a declaratory judgment case, it must have before it a "justiciable controversy." *City of Joplin v. Jasper County*, 349 Mo. 441, 161 S.W.2d 411 (1942) [2-4]; *Pollard v. Swenson*, *supra*, [3-10]. The petition must present a real, substantial, presently existing controversy

admitting of specific relief as distinguished from an advisory decree upon a hypothetical situation. The question is not whether the petition shows that plaintiff is entitled to a declaration in accordance with the theory he states, but whether he is entitled to a declaration at all. *Pollard v. Swenson, supra*. Plaintiffs must show that they have a legally protectible [sic] interest at stake and that the question they present is appropriate and ripe for judicial decision. The facts on which the decision is demanded must have accrued so that the judgment declares the existing law on an existing state of facts. *Higday v. Nickolaus*, 469 S.W.2d 859 (Mo.App.1971) [1-3]. A mere difference of opinion or disagreement or argument on a legal question does not afford adequate ground for invoking the judicial power. *Tietjens v. City of St. Louis*, 359 Mo. 439, 222 S.W.2d 70 (banc 1949) [1-4]. "No justiciable controversy exists ... unless an actual controversy exists between persons whose interest are adverse in fact .... Actions are merely advisory when there is an insufficient interest in either plaintiff or defendant to justify judicial determination, i.e., where the judgment sought would not constitute a specific relief to one party or the other. Such actions are merely advisory when the judgment would not settle actual rights. If actual rights cannot be settled the decree would be a pronouncement of only academic interest." *State ex rel. Chilcutt v. Thatch*, 359 Mo. 122, 221 S.W.2d 172 (banc 1949)

> [5-7]. To qualify as "any person" under the statute, a party seeking a declaratory judgment must have a legally protectible [sic] interest at stake and the declaration sought must be of a question appropriate and ready for judicial resolution. "A legally protectible [sic] interest contemplates a pecuniary or personal interest directly in issue or jeopardy which is subject to some consequential relief, immediate or prospective." *Absher v. Cooper*, 495 S.W.2d 696 (Mo.App.1973) [1-4].

City of Jackson v. Heritage Sav. & Loan Ass'n, 639 S.W.2d 142, 144 (Mo. App. 1982) (emphasis added, footnote omitted).

A. ***Plaintiffs Lack Standing.*** Plaintiffs are the County, the County Executive in his official capacity, and a taxpayer. Under *Missouri Association of Counties v. Wilson*, 3 S.W.3d 772, 776-77 (Mo. banc 1999), neither the County nor the County Executive in his official capacity has standing. Plaintiffs do not like *MAC*, nor its holding, but they have not (and cannot) show that it has been overruled. Nor can this Court ignore such clear precedent. These two plaintiffs must be dismissed.

B. ***There Is No Present, Live Controversy***. Even the taxpayer must be dismissed because, under the legal standard set forth above, there is no present controversy between the taxpayer and the State. The taxpayer has stipulated – and has now conceded in his brief – that the State is not (and will not be) attempting to force the appropriate county official to issue concealed weapons permits. The fact that a frustrated permit seeker may

some day sue the appropriate county official does not give the taxpayer standing to sue the State. The first issue in such a hypothetical case, as noted above, is who (under the St. Louis County Charter) is the appropriate official with respect to these duties and thus who is the appropriate defendant. Then, if there is a Hancock Amendment defense to be asserted in that future, hypothetical case by this hypothetical (but currently unknown) proper defendant, the legitimacy of that defense can be litigated at that time between those parties. Presumably, as noted above, that litigation will include the question of whether – under *Brooks*, 128 S.W.3d at 850 – the appropriate county official was required to avail himself or herself of (or at least consider) the "delegation option" provisions in § 571.101.12 as a pre-requisite to asserting a Hancock Amendment defense.

Neither the identity of the appropriate county official, nor the applicability of a Hancock Amendment defense to a hypothetical future case seeking to compel that official to issue concealed weapons permits, can properly be determined in the present suit in which the State is merely functioning as Plaintiffs' "strawman" defendant.

Conclusion

As argued in the State's opening brief, the Hancock Amendment is a shield, not a sword. By Plaintiffs' own admission, they do not fear any future action by the State. Instead, they admit that they are using this lawsuit to prevent future actions by third parties. This is a patent misuse of the declaratory judgment process. If the appropriate official in St. Louis County is truly refusing to issue concealed weapons – and nowhere

do Plaintiffs allege either that such permits are being sought or that the appropriate county official is refusing to issue them – then let that official stand ready to defend those actions against the frustrated permit seekers (if any). No party to this lawsuit would even be a proper party to such a lawsuit. Yet, Plaintiffs are asking this Court to issue judgments which they then hope can be used in the defense of the hypothetical future suits by hypothetical plaintiffs against whomever is the proper defendant. Their plea should be denied, and this Court should grant the State's motion for summary judgment.

Respectfully submitted,

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Certificate of Service

The undersigned hereby certifies that a copy of the foregoing was mailed, postage prepaid, on this _____ day of September, 2004, to:

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