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STATEMENT OF FACTS REPLY

The fact that the State does not contradict or even contest any of the specific statements made in Brooks et al. Statement of Facts regarding the consequences of the Conceal and Carry Act demonstrates their factual nature. It was important to note the uncontroverted nature and effect of these provisions of the Act. While the State may prefer to ignore the dangerous consequences of the decriminalization of Missouri firearms law, they are not only relevant but crucial to Brooks et al. claims, both that Missouri citizens banned this "evil" practice in 1875 (clause 2 of Article I, Section 23) and that this Act infringes on and evades their constitutional right to defend "home, person and property." (Clause 1 of Article I, Section 23). The presumably unintended consequences of the Act are also critical to Brooks et al. arguments under Points VI and VII of their Cross-Appeal. The State set forth what it considered important in its reading of the Act in its Statement of Facts—Brooks et al. have the right to do the same. The fact that neither side specifically disputes any of the these significant provisions proves their factual nature. Other than this comment in response to the State's argument regarding Brooks et al. Statement of Facts, they do not have any additional facts to offer the Court at this time.

POINTS RELIED ON

IV. THE TRIAL COURT ERRED BY NOT DECLARING THE CONCEAL AND CARRY ACT UNCONSTITUTIONAL AND ENJOINING IT BECAUSE THE ACT VIOLATES ARTICLE X, SECTIONS 16 AND 21 OF THE MISSOURI CONSTITUTION IN THAT, ON ITS FACE, THE ACT PREVENTS FUNDING OF THE ADDITIONAL COSTS CAUSED BY THE NEW OR INCREASED LOCAL ACTIVITIES OR SERVICES IT MANDATES, OTHER THAN TRAINING AND EQUIPMENT.

Curchin v. Missouri Industrial Development Board, 772 S.W.2d 930 (Mo. banc 1987)

Missourians to Protect the Initiative Process v. Blunt, 799 S.W.2d 824 (Mo. banc 1990)

Kinder v. Holden**,** 92 S.W.3d 793 (Mo. App. 2002)

City of Jefferson v. Missouri Department of Natural Resources, 916 S.W. 2d 794 (Mo. banc 1996)

V. THE TRIAL COURT ERRED BY NOT DECLARING THE CONCEAL AND CARRY ACT UNCONSTITUTIONAL AND ENJOINING IT BECAUSE THE ACT VIOLATES ARTICLE X, SECTIONS 16 AND 22 OF THE MISSOURI CONSTITUTION IN THAT, AS APPLIED, THE PERMIT FEES USED FOR PURPOSES OUTSIDE THE ACT CONSTITUTE A GENERAL REVENUE TAX NOT APPROVED BY THE VOTERS.

Curchin v. Missouri Industrial Development Board, 772 S.W.2d 930 (Mo. banc 1987)

Missourians to Protect the Initiative Process v. Blunt, 799 S.W.2d 824 (Mo. banc 1990)

Kinder v. Holden**,** 92 S.W.3d 793 (Mo. App. 2002)

City of Jefferson v. Missouri Department of Natural Resources, 916 S.W. 2d 794 (Mo. banc 1996)

VI. THE TRIAL COURT ERRED IN NOT DECLARING THE CONCEAL AND CARRY ACT UNCONSTITUTIONAL AND ENJOINING IT BECAUSE THE ACT IS VOID FOR VAGUENESS IN THAT THE ACT FAILS TO PROVIDE ADEQUATE OTICE OF THE PROHIBITED CONDUCT AND SET STANDARDS FOR ITS FAIR ENFORCEMENT.

City of Chicago v. Morales, 527 U.S. 41 (1999)

Secretary of State of Md. v. Joseph H. Munson Co., 467 U.S. 947 (1984).

Kolender v. Lawson, 461 U.S. 352(1983)

Mathews v. Eldridge, 424 U.S. 319 (1976)

VII. THE TRIAL COURT ERRED BY NOT DECLARING THE CONCEAL AND CARRY ACT UNCONSTITUTIONAL AND ENJOINING IT BECAUSE THE ACT VIOLATES ARTICLE I, SECTION 1 OF THE MISSOURI CONSTITUTION IN THAT THE ACT USURPS THE PEOPLE'S WILL AS EXPRESSED BY THE DEFEAT OF PROPOSITION B IN 1999.

VIII. THE TRIAL COURT ERRED BY DENYING BROOKS ET AL. PRE- AND POST-JUDGMENT MOTIONS TO AMEND PLEADINGS TO CONFORM TO THE EVIDENCE BECAUSE RULE 55.33 CONTEMPLATES SUCH AN AMENDMENT IN THAT THE TESTIMONY OF STATE'S WITNESSES RAISED NEW HANCOCK VIOLATIONS.

ARGUMENT

IV. THE TRIAL COURT JUDGMENT DECLARING THE CONCEAL AND CARRY ACT UNCONSTITUTIONAL AND PERMANENTLY ENJOINING ITS ENFORCEMENT MUST BE AFFIRMED BECAUSE THE ACT VIOLATES ARTICLE I, SECTION 23 IN THAT THE LANGUAGE AND INTENT OF SECTION 23 RESERVES TO CITIZENS LIMITED RIGHTS TO KEEP AND BEAR ARMS AND PROHIBITS THE WEARING OF CONCEALED WEAPONS.

A. The General Assembly's Plain Language Should Not be Abused

The Conceal and Carry Act violates the Hancock Amendment because of one sentence. The second sentence of Section 50.535.2 reads as follows: "This fund shall only be used by law enforcement agencies for the purchase of equipment and to provide training." If the General Assembly had intended for the sheriff's revolving fund to be used generally to fund all of the Act's costs it could and should have easily said so with a different sentence, something to the effect: "This fund shall only be used by law enforcement agencies to pay for the new or increased activities and services mandated by this Act." The General Assembly did not so state. Despite the State's strained reading of this sentence to the contrary, the General Assembly wants law enforcement agencies to use the permit fees for the purchase of equipment and to provide training *only*.

The General Assembly added this unusual sentence for a reason. It must have been an important reason because the State does not suggest that this sentence can be severed from the rest of the Act to cure the obvious Hancock violation, as they do with other provisions. See State's Reply Brief, p. 40, fn.9. Perhaps it is because without this

sentence there is no authority to spend the money in the sheriff's revolving fund for any purpose--to fund the Act or otherwise. While the courts may be able to sever some unconstitutional provisions of legislative enactments, they cannot rewrite the legislation to make it constitutional. Akin v. Director of Revenue, 934 S.W.2d 295, 300 (Mo. banc 1996). The Hancock Amendment makes the funding provisions of any legislative enactment absolutely critical to the issue of whether it passes constitutional muster. That is why the State must vigorously defend the indefensible by arguing that the one sentence of the Act, which dictates how it is to be funded, does not mean what it says.

As for the State's interpretation of the General Assembly's unusual funding provision, it boldly claims the plain language allows law enforcement agencies to spend concealed carry application fees for any purpose under the sun, as the word "only" modifies just *who* may spend the money. The State claims that the categories of "equipment" and "training" are illustrative only, despite the absence of any plain language indicating that they are merely examples or stating that the funding could be used for other purposes as well. Does that mean that the word "only" in Section 571.094.5 of the Act modifies "sheriff" and not the rest of the sentence? The State's contorted construction of this funding provision may also give rise to other questions about the meaning of the word "only" when used in other Missouri statutes. By adopting this strained interpretation, the Supreme Court would undermine legislative intent in general, as well as do an injustice to the clear intent in this Act to authorize law enforcement agencies only to use the permit fees for training and equipment purposes.

The General Assembly had already made its intent clear in Section 50.535.1 and the prior sentence of Section 50.535.2, by stating that the permit fees were to be deposited into the fund controlled by law enforcement agencies, expended only at their direction and no prior approval, audit or encumbrance was required before they spent it. The use of the word "only" to modify just "law enforcement agencies" would be mere surplussage as it was not necessary to express the already clear intent as to who should receive, control and expend these funds. But perhaps most important is the placement of the word "only" in the second sentence of Section 50.535.2. "Only" appears before the word "used," so it modifies the *use* of the fund in general, which includes both who uses it and how it is used. Because it appears before the verb "used" rather than the noun "law enforcement agencies," it applies to the remainder of the sentence. So by definition the General Assembly clearly limited the categories of expenditure for which the sheriff's revolving fund can be used. Any other construction would do damage to the syntax and semantics of the English language.

The case cited by State, Cape Motor Lodge, Inc. v. City of Cape Girardeau, 706 S.W.2d 208, 212 (Mo. banc 1986) is taken out of context as it discusses permissive language using the word "may," rather than the restrictive language chosen by the General Assembly for the funding provision of this Act. If anything, the Cape Motor Lodge case demonstrates the fallacy in the State's interpretation that the terms "equipment" and "training" are illustrative only, and therefore, the fund "*may*" be expended for any other unspecified purpose. As this cases states, "[T]he test for determining if a conflict exists is whether the ordinance 'permits what the statute

prohibits' or 'prohibits what the statute permits.'" Id. at 211, citing Page Western, Inc. v. Community Fire Protection Dist. of St. Louis, 636 S.W.2d 65, 67 (Mo. banc 1982) and Vest v. Kansas City, 194 S.W.2d 38, 39 (Mo. banc 1946). Paraphrasing these cases, the Act prohibits what the Missouri Constitution requires—full funding of all new or increased activities and services.

The use of the term "law enforcement agencies" in the second sentence of Section 50.535.2 is important for another reason. That term includes both sheriffs and the police chiefs to whom they may delegate duties under Section 50.535.3 of the Act. Consequently, this funding limitation applies to both sheriffs and police chiefs throughout Missouri, all of whom can only use permit fees for the purchase of equipment and to provide training. The State's argument that delegating sheriffs must reimburse police chiefs for "any reasonable expenses" ignores the limiting language applicable to both in the prior section. For whatever reason, the General Assembly told all law enforcement agencies that they could only use permit fees for equipment and to provide training. As much as it would like to, the Attorney General cannot rewrite this sentence nor ask the Court to do so, because of the critical, but flawed funding mechanism under the Act.

B. The Act Mandates Entirely New Activities And Services

Moving from its strained interpretation of the statutory language, the State next strains to argue that Brooks et al. failed to prove the Act does not mandate new or increased activities and services. Pages 82 through 86 of Brooks et al. initial Brief, sets forth an illustrative, but not an exhaustive list of the new and/or increased activities and services mandated by the Act. Captain Philip Moran of the Jackson County Sheriffs

Department confirmed this claim in his detailed testimony regarding the effects of the Act. (TR p. 25, l. 16—p. 30, l. 25) See also testimony of Sheriff John Page (TR p. 63, l. 22—25; p. 64, l. 1—p. 71, l. 25) The services and activities mandated by the Act exceed the present level of law enforcement responsibility, both in nature and number. The State seems to argue that this litany of tasks, which will take significant time and money to perform, even in small counties, makes no difference because law enforcement does *some* of them already for other reasons. For instance, it claims that law enforcement agencies currently perform fingerprint analyses and background checks for reasons unrelated to carrying concealed firearms. While that may be true, these activities and services are paid out of general revenue, rather than being an expense supposedly paid through user fees. The State's argument points to the precise problem with this Act—it does not give law enforcement agencies the authority to pay the $38 fingerprint charges assessed by the State, making them a new *unfunded* mandate.

The State did not bother to individually address any of the new activities and services specified by Brooks et al. because it would be readily apparent that the Act does not mirror in nature or in scope current Missouri law regarding firearms, nor should it. For instance, the existing law regarding permits to acquire a concealable firearm, which the State claims is similar, does not even require either fingerprinting or background checks. Section 571.090 R.S.Mo. The provisions of Section 571.090 R.S.Mo. regarding the mere acquisition of concealable firearms fit on two pages of Vernon's Annotated Missouri Statutes. The Act will fill many more pages because it exponentially expands the regulatory scheme to address carrying concealed firearms. The General Assembly

correctly recognized that someone *carrying* a *concealed* firearm in public has a much greater responsibility than merely *owning* a *concealable* firearm. As a result, it imposed new activities and services on the law enforcement officers who must administer this statutory scheme. For example, the subject Act mandates training which must be approved by local sheriffs (Section 571.094.25-27), coordination with the Department of Revenue to issue licenses (Section 571.094.7-8 and 16-18), and removal of permit holders carrying firearms in prohibited locations (Section 571.094.20-21)—none of which are part of the statutory scheme governing the mere ownership of concealable firearms.

C. The Act Mandates An Increase In Existing Activities and Services

The evidence also clearly shows that the volume of the concealed carry applications will result in a significant increase in law enforcement agencies' present level of services and activities, by multiplying the number of fingerprint analyses and background checks they will have to perform. Captain Moran testified that Jackson County expected 5,000-6,000 new applications in the initial year based on his inquires. (TR p. 21, l. 14—p. 23, l. 4) As Captain Moran indicated, the number of permits to acquire a concealable firearm under §571.090 R.S.Mo. is perhaps the best evidence of the number of applications to carry those firearms concealed. See State's Reply Brief, p. 58, for the number of annual requests for §571.090 R.S.Mo. permits in these four counties alone.

Since acquisition permits do not require a fingerprint analysis, but concealed carry applications do, the Act will clearly and significantly increase the level these existing

activities and services. Even if this Court should find that the Act does not impose any new activities or services on local law enforcement, there is no doubt that it increases the activities and services that are presently provided by law enforcement agencies. The potential increase in these four counties alone could exceed 10,000 given only the present number of owners of concealable firearms. While one permit application might be *de minimus,* hundreds or thousands of them are not. The evidence clearly shows that there will be much more than a *de minimus* number of applications resulting in much more than *de minimus* costs associated with processing them and continuing administration of the Act. (TR. p. 14, l. 18—p.15, l. 14; p. 46, l. 20—p. 48, l. 3)

D. The Act Has Already Significantly Increased Costs in Jackson County

The State then goes on to argue that Brooks et al. have not proved any actual increased costs because the Act has not gone into effect so the witnesses had no experience from which to testify. The Jackson County Sheriff has already asked the County Legislature for $150,000 (TR. p. 15, l. 15). This is not speculative in nature because counties, particularly the larger ones, must arrange funding in advance of providing services and activities in order to insure smooth administration of the process and proper service to the public.

Unlike the Jefferson I (City of Jefferson v. Missouri Department of Natural Resources, 863 S.W.2d 844 (Mo. banc 1993)) and II (City of Jefferson v. Missouri Department of Natural Resources, 916 S.W.2d 794 (Mo. banc 1996)) cases cited by State, this unfunded mandate does not involve merely a bi-annual update of a solid waste management plan, which is relatively limited in scope. If the bi-annual updating of a

solid waste plan, which was the subject of Jefferson I and II results in increased costs, there is no question that the entire panoply of this Act does so. Jefferson II at 797. In fact, this issue has already been addressed on pages 88 through 90 of Brooks et al. initial Brief to which the State also failed to respond.

Rather, on the date this Act becomes effective, if it does, the Jackson County Sheriff will be literally faced with dozens if not hundreds of citizens filing applications for permits that he must act upon within a short time frame or they are automatically granted. Section 571.094.5-7. Funding must be in place in Jackson County to provide the staff and other support necessary to comply with the mandates of the General Assembly. The prospective nature of Brooks et al. evidence was more than sufficient for Jackson County to act upon. It is all that will ever be available before the Act takes effect. The State has a simple choice, either address the issue now, prospectively, with the best evidence available through law enforcement witnesses from both sides or address it later with the repercussions that will follow if this Court should find that the Act is unconstitutional in any way.

E. Judicial Economy Dictates that Hancock Challenges Should be Resolved Now Rather than Later

If Brooks et al. had waited to file their constitutional challenges until after the fact then they would have been criticized because permits had already been granted. There is no doubt that applications for concealed carry permits will be filed on the first date possible and permits will be granted shortly thereafter under the Act. There is also no doubt that those permit holders will claim a property right in their concealed carry permit

after paying $100 for it, if the Act were later ruled unconstitutional on whatever grounds. Instead, Brooks et al. raided these constitutional violations before the Act went into effect so that no one, from concealed carry applicants to law enforcement agencies and everyone in between, would rely on an unconstitutional law to their detriment. By the time a sufficient history of the activities, services and costs resulting from implementation of the Act could be developed, literally thousands of permits would have been granted to individual citizens at a cost of millions of dollars.

If the constitutional challenges to this law under Hancock or otherwise are made successfully after the fact, the State will be faced with a large number of angry citizens. Will they be entitled to a refund of their application fee? If so, who will pay that refund? What about their other costs associated with obtaining a concealed carry permit such as training fees or the price of a concealable firearm? This Court will be faced with all of these issues in addition to the constitutional questions presently before it, if it defers a decision on the Hancock challenges until there is an actual history of the activities, services and costs mandated by this Act. One would think that the State, in particular the Attorney General's Office which will have to defend this myriad of litigation, would want to address this issue prospectively rather than face lawsuits over voided permits if this Act is found unconstitutional under the Hancock Amendment or otherwise.

This second sentence of Section 50.535.2 has universal effect and application. Its interpretation should not and cannot vary on a county-by-county basis. Whatever it means, the funding authority must be standard throughout the State of Missouri. The problems arising from varying interpretations of this funding limitation in light of the

Hancock Amendment can be seen by the different approaches devised by various sheriffs to evade the Act and/or eviscerate the Missouri Constitution. There is no reason why the plain meaning of this unusual provision cannot be judicially confirmed now since it does not depend upon any evidence from individual counties or citizens.

That is exactly what this Court did in City of Jefferson v. Missouri Department of Natural Resources, 916 S.W.2d 794 (Mo. banc 1996), which is the primary authority relied upon by State to oppose a decision, at least for now, on this issue. In Jefferson II, this Court did affirm the trial courts findings that Jefferson City faced increased costs to develop an updated solid waste plan. Id. at 797. Based on the second sentence in Section 50.535.2, and on this sentence alone, this Court should find that it limits expenditure of the sheriff's revolving fund to the extent that a constitutional violation of the Hancock Amendment is unavoidable. If the Act is unconstitutional as written in one county, it is unconstitutional in all counties in Missouri. A decision by this Court in this case will have sufficient precedential effect to put law enforcement agencies on notice throughout the State. Then if a sheriff chooses to implement this Act, he does so at his own peril, and the county's as well.

F. A Justiciable Controversy Exists Due To The Public Interest

The State's primary arguments against both Points IV and V of Brooks et al. Cross-Appeal focus on the justiciability of these claims rather than their merits. Brooks et al. are surprised by the State's use of justiciability arguments, both ripeness and standing, after the Act was enjoined, given its stated intent of resolving the constitutional issues as soon as possible. The State realized, at least in the trial court, that it would be

better to address all constitutional challenges to the Act before it went into effect rather than dealing with the consequences of an adverse ruling after permits have been issued. Nothing has changed in this regard and for that reason alone claims of justiciability should fall on deaf ears. As this Court stated in Curchin v. Missouri Industrial Development Board, 772 S.W.2d 930, 931 (Mo. banc 1987):

> In our view, disposition of this case on procedural or justiciability issues would leave all those who do have a legitimate interest in resolving the ultimate controversy hanging in midair. If §100.297 is unconstitutional, the sooner we face up to it, the sooner the state can get on with other methods of developing its economic resources.
>
> Despite the question of justiciability, the constitutional issues are fully briefed and argued and the rights of all interested persons appear to be adequately represented and can be protected. We conclude that the economic importance and the general public interest justify both our expedited review and our determination of the case on the merits and it is in the best interests of judicial economy and of the continued economic development of our state that we finally resolve this issue.

The public interest in the issue of concealed carry and the economic consequences of a delayed decision by this Court argue at least as strongly in favor of justiciability in this case as they did in the Curchin. Due to the need for judicial economy this Court has not dismissed causes which it knows will result in the institution of another lawsuit that will evidentially return to it, particularly when both parties request a review by this Court

as was the case here. Gregory v. Corrigan, 685 S.W.2d 840, 841-842 (Mo. banc 1985). All of the parties have spent a great deal of time and effort on an expedited basis to bring these issues before the Missouri Supreme Court. To now suggest, as the State apparently does, that they should be left for another day not only delays a final decision but may make it much more costly and difficult to make.

G. Ripeness

The first reason the State uses to delay resolution of the Hancock issues is a claim that they are not ripe for adjudication because the Act has not gone into effect. Basically the State is claiming that no court can address the constitutional issues raised by the Hancock Amendment until counties and other political subdivisions have a duty to implement the Act and incur the cost of doing so. This Court does not require that the damage be done before a case is ripe for adjudication. In order that a controversy to be ripe for adjudication a "sufficient immediacy" must be established. Buechner v. Bond, 650 S.W.2d 611, 614 (Mo. banc 1983), citing Nations v. Ramsey, 387 S.W.2d 276, 279 (Mo. App. 1965). While ripeness cannot rest on probability, neither did Brooks et al. in submitting the evidence before this Court. In a declaratory judgment action such as this, ripeness merely requires a "question appropriate and ready for judicial determination." Ashworth v. City of Moberly, 53 S.W.3d 564, 571 (Mo. App. 2001).

City of St. Louis v. Milentz, 887 S.W.2d 709, 711 (Mo. App. 1994), citing Tietjens v. City of St. Louis, 222 S.W.2d 70, 72 (1949), held that a declaratory judgment action is an appropriate way to test the validity of the statute or ordinance. The Milentz court did not require that the City of St. Louis terminate an employee in order to test the

validity of a Missouri statute and a city ordinance authorizing forced retirement. "[T]he fact that the City and Retirement System wish to enforce the statute and ordinance but had not actually 'forced' Horne to retire or terminated his salary does not make this action premature." Id. at 712. Once the Secretary of State decides to submit an initiative issue to voters, any controversy as to whether the constitutional prerequisites have been met is ripe for judicial determination. Missourians to Protect the Initiative Process v. Blunt, 799 S.W.2d 824, 828 (Mo. banc 1990). Similarly, this constitutional challenge on Hancock grounds is ripe when the General Assembly submits its decision to the public in the form of a law. For the same reason this Court does not require a vote on the initiative issue before addressing constitutional challenges, this Court should not require implementation of this Act before Brooks et al. challenges are ripe for adjudication.

City of Jefferson II, relied on so heavily by State, upheld the finding of the trial court that Jefferson City faced increased costs to develop an updated solid waste plan which was statutorily mandated without funding. Id. at 797 It used only prospective evidence to reach this result because Jefferson City had not developed an updated plan so the testimony contained only cost estimates. While the Court also found that it was impossible to ascertain whether Jefferson City would actually have increased implementation costs and to what extent those costs would result from an unfunded mandate, its specifically stated that "The mandate that Jefferson City comply with §260.325.8 is **suspended** until the General Assembly actually appropriates funds to pay the city's increased planning costs." (Emphasis added) Id.

H. Standing

The States other last ditch justiciability challenge is characterized as one of "standing"—that Brooks et al. "failed to prove a sufficient nexus between any individual Plaintiff and the political subdivision suffering under the supposed 'unfunded mandate.'" (State's Reply Brief at 47) Any analysis of standing to claim a violation of the Hancock Amendment to the Missouri Constitution must begin with Article X, Section 23 which states: "Notwithstanding other provisions of this Constitutions or other law, any taxpayer of the state, county **or** other political subdivision shall have standing to bring suit in a circuit court of proper venue … to enforce provisions of Sections 16 through 22, inclusive of this article…." (Emphasis added) The constitutional standing granted under the Hancock Amendment is broader than normal taxpayer standing because "any" taxpayer has it, whether they pay taxes to the State, a county *or* other political subdivisions. This section, granting standing to taxpayers to enforce constitutional provisions confers standing upon taxpayers in addition to those persons ordinarily granted standing—it does not limit standing. State ex rel. City of St. Louis v. Litz, 653 S.W.2d 703, 707 (Mo. App. 1983)

"Reduced to its essence, standing roughly means that the parties seeking relief must have some personal interest at stake in the dispute, even if that interest is attenuated, slight or remote." Ste. Genevieve Sch. Dist. R-II v. Bd of Aldermen, 66 S.W.3d 6, 11 (Mo. banc 2002), citing Raines v. Byrd, 521 U.S.811, (1997). In the context of the declaratory judgment action, this merely requires that the plaintiff have a "legally protectable interest at stake in the outcome of the litigation," which "exists if the plaintiff

is directly and adversely affected by the action in question or if the plaintiff's interest is conferred by statute." Id. at 10. In addition to the *constitutional* standing conferred by Article X, Section 23, Brooks et al. presented evidence of: (1) a direct expenditure of funds generated through taxation, (2) and increased of levy in taxes, and (3) a pecuniary loss attributable to the challenged transaction of a municipality. Eastern Missouri Laborer's Dist. Council v. St. Louis County, 781 S.W.2d 43, 47 (Mo. banc 1989).

"The private injury that invests standing to a taxpayer is not a purely personal grievance in which other taxpayers have no interest, rather it is an injury shared by the public." Kinder v. Holden, 92 S.W.3d 793, 803 (Mo. App. 2002), quoting Querry v. State Highway and Transp. Comm'n., 60 S.W.3d 630, 635 (Mo. App. 2001). A primary objective of the standing doctrine is to make sure that a sufficient controversy exists between the parties so that the case will be adequately presented to the court. Ryder v. St. Charles County, 552 S.W.2d 705, 707 (Mo. banc 1977). In this case is sufficient nexus exists between the status of Brooks et al., their allegations, their legal interests and their request for relief to permit standing to assert constitutional claims under the Hancock Amendment. This was the finding of the trial court after hearing the evidence when the Judgment and Order states in paragraph 7: "The Court finds that the individual Plaintiffs have standing as individuals residents, Missouri citizens and taxpayers to litigate these claims." (LF 378).

V. THE TRIAL COURT ERRED BY NOT DECLARING THE CONCEAL AND CARRY ACT UNCONSTITUTIONAL AND ENJOINING IT BECAUSE THE ACT VIOLATES ARTICLE X, SECTIONS 16 AND 22 OF THE MISSOURI CONSTITUTION IN THAT, AS APPLIED, THE PERMIT FEES USED FOR PURPOSES OUTSIDE THE ACT CONSTITUTE A GENERAL REVENUE TAX NOT APPROVED BY THE VOTERS.

Since the State did not distinguish between Points IV and V in its Reply Brief, Brooks et al. made their complete response under Point IV which they incorporate by reference here.

VI. THE CIRCUIT COURT ERRED IN NOT DECLARING THE 2003 AMENDMENTS UNCONSTITUTIONAL AND VOID FOR VAGUENESS BECAUSE PLAINTIFFS HAVE STANDING IN THAT THEY ARE DIRECTLY AFFECTED AND ARE IN DANGER OF SUSTAINING DIRECT INJURY, AND THE 2003 AMENDMENTS ON THEIR FACE NOT ONLY FAIL TO SPECIFY A CONSTITUTIONALLY ADEQUATE STANDARD OF CONDUCT, BUT IN CERTAIN INSTANCES FAIL TO SPECIFY ANY STANDARD OF CONDUCT AT ALL.

The State has failed to respond to Brooks et al. claim that the Act is unconstitutional under the second test set forth by the United States Supreme Court in City of Chicago v. Morales, 527 U.S. 41 (1999). Apparently the State is unable to rebut this constitutional argument which has been acknowledged by this Court in multiple cases. Because *by definition* the Act failed, in multiple respects, to set forth standards by which it can be determined objectively, non-arbitrarily, and without discrimination whether or not instances of conduct are prohibited, the Act is unconstitutional on its face.

A. Direct Standing

Brooks et al. have standing as residents and taxpayers of the State of Missouri who are subject to liability for actions taken, and events occurring, on premises under their control—their dwelling places, their businesses, and all other venues considered to be under their control, even non-exclusively (collectively, referred to as "controlled premises"). If the Act is allowed to go into effect, Brooks et al. will sustain injury AND be placed in immediate danger of sustaining further direct injury. Citizens, including

Brooks et al. who want to avoid liability for the consequences of having concealed firearms at controlled premises, including their homes, have no way under the Act reliably to prevent the wearing of such weapons on such premises for a number of reasons. First, they will have no way of determining whether persons entering controlled premises are wearing concealed weapons. Second, by specifically providing in Section 571.094.21 that the wearing of concealed weapons EVEN ON PRIVATE PROPERTY POSTED AS BEING OFF-LIMITS TO CONCEALED FIREARMS is NOT a criminal act, the Act, makes it more likely that persons who choose to wear concealed weapons will ignore any such posting with impunity, and will be less inclined to tell the truth regarding the presence of concealed weapons. Third, the Act is so indefinite, and contains so many exceptions that are insusceptible of ready determination, that they fail to "convey [ ] to a person of ordinary intelligence a sufficiently definite warning…when measured by common understanding and practices." Cocktail Fortune, Inc. v. Supervisor of Liquor Control, 994 S.W.2d 955, 957 (Mo. banc 1999).

The constitutional rights of Brooks et al. are indeed at risk because of the arbitrariness of the Act. And the fact that they are at risk is unconstitutional and in need of remedy because Brooks et al. and all who are similarly situated, are being placed at risk by this legislation, even though they have done nothing wrong. They are at risk merely because they are Missouri residents.

Further injury to which Brooks et al. and all Missouri citizens are subject to is economic exposure for damages under Missouri's premises liability laws. The system by which Missouri determines liability gives great weight to the status of an entrant on

controlled premises. The fact that under the Act it would no longer be criminal to enter controlled premises wearing concealed weapons--or, when asked, to lie about whether one was wearing concealed weapons—makes it more likely that persons will do so. Therefore, Brooks et al and all persons controlling such premises will be at greater risk of being considered responsible for injuries sustained because persons carrying concealed weapons may be deemed guests or invitees.

B. Jus Tertii Standing

In addition to direct standing, Plaintiffs may have standing as third parties under the doctrine of *jus tertii* standing articulated by the United States Supreme Court in Secretary of State of Md. v. Joseph H. Munson Co., 467 U.S. 947 (1984). In Munson, the Court stated that constitutional challenges to overly broad statutes are allowed not primarily for the benefit of the litigant, but rather for the benefit of society. Therefore, limitations on standing may be outweighed by society's interest in having a statute challenged. Id. at 958. Thus, when circumstances are such that no party with direct standing is likely to institute action and a third party satisfies the crucial requirements of injury in fact and having the ability satisfactorily to frame the issues in a case, a lessening of prudential limitations on standing may be justified. Id. Plainly, just as the Supreme Court stated that "society as a whole …would be the loser" if there is a possibility that one having direct standing would not challenge a facially invalid statute, Id., Missouri society as a whole will be the loser if Brooks et al. assertions of unconstitutional vagueness are denied in this case on the basis of standing. See State v. Duren, 556 S.W.2d 11 (Mo banc 1977); Ryder v. County St. Charles, 552 S.W.2d 705 (Mo. banc

1977); City of St. Louis v. Missouri Commission on Human Rights, 517 S.W.2d 65 (Mo. 1974).

C. Vagueness.

The State quotes perhaps the most common articulation of the test for determining whether or not a statute is void for vagueness, but it has not attempted to address the heart of the vagueness doctrine as it is at issue here. As the U.S. Supreme Court has stated, "the more important aspect of the vagueness doctrine 'is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement.'" Kolender v. Lawson, 461 U.S. 352, 358 (1983), (quoting from Smith v. Goguen, 415 U.S. 566, 574 (1974)). This Court has employed the balancing test set forth by the U.S. Supreme Court in Mathews v. Eldridge, 424 U.S. 319, (1976) stating that it identifies three factors to be considered in determining the process due, as follows:

> (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probably value, if any, of additional or substitute procedural safeguards; and (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

State ex rel. Cook v. Saynes, 713 S.W.2d 258, 262 (Mo. banc 1986).

As noted, the private interests of Brooks et al. that are affected by the Act is to avoid concealed weapons in the sanctuary of their homes and other private places under

their control. The risk of an erroneous deprivation of this interest is so high as to be almost a certainty. Some of the most apparent examples of this deprivation include the inability to know whether someone else, arguably having authority to do so, has given consent for the wearing of weapons on controlled premises; the multiple vagaries surrounding the evidencing of oral consent which may be given by any member of an amorphous group of persons having ownership or managerial rights; whether a wearer of weapons will leave if and when asked to do so, given that the consequences of not doing so are de minimus even if a peace officer is available and responds to a call; how long the wearer must stay away, and whether, having been asked to leave, he or she will obtain permission from someone else within the orbit of permissible authority and soon return; and the inability to determine whether any given premises will reliably be weapon-free (i.e., whether an establishment is or is not a restaurant or a bar or a place of religious worship or a portion of a building used as a child care facility, etc.).

Under the third factor of the balancing test, the relevant governmental interests here are that of enabling all parties involved, those wishing to conceal weapons, law enforcement and those who wish to avoid the presence of concealed weapons—to assert their rights and discharge their duties with confidence and certainty. As the Supreme Court stated in Kolender:

> Our Constitution is designed to maximize individual freedoms within a framework of ordered liberty. Statutory limitations on those freedoms are examined for substantive authority and content as well as for definiteness or certainty of expression….The void-for-vagueness doctrine requires that a penal statute define

the offense… in a manner that does not encourage arbitrary and discriminatory enforcement. 461 U.S. at 357

As this Court has recently acknowledged, conduct that is *malum prohibitum* is more susceptible to a void for vagueness challenge than conduct that is *malum in se*. See State v. Bratina, 73 S.W.3d 625 (Mo. banc 2002). Brooks et al. respectfully request that this Court acknowledge the fundamental importance of the rights set forth in the Missouri Constitution for all Missouri citizens and find that the legalization of the wearing of concealed weapons, if it is to take a place in Missouri, must be done in a manner that is not vague and almost certain to be characterized by arbitrary and discriminatory "enforcement," if indeed there is to be any enforcement at all.

VII. THE CIRCUIT COURT ERRED IN NOT DECLARING THE SO-CALLED "2003 AMENDMENTS" UNCONSTITUTIONAL BECAUSE THE GENERAL ASSEMBLY ACTED WITH DISDAIN FOR ARTICLE I, SECTION 1 OF THE MISSOURI CONSTITUTION WHEN IT ENACTED THE 2003 AMENDMENTS.

The State claims that "it can take more than one legislative cycle to build support for a controversial new idea," and that therefore respect for the voice of Missouri voters as evidenced in the referendum of April, 1999 has no place in the legislative process. State's Reply Brief at 78. The State indulges in wishful thinking. There is no evidence that the Act passed because of "support for a controversial new idea." What the State calls the "failed referendum" was actually an accurate and successful manifestation of the voice of the people.

The State may be correct in its statement that the electorate changes its views on many public issues, Id. If the General Assembly truly thought that support had built for the new idea of carrying concealed weapons, it would have given the voters a chance to so demonstrate by again submitting concealed carry legislation to a referendum. The fact that that it did not do so speaks eloquently of the manner in which the Act was passed. The only evidence of the will of the majority of Missouri voters was the referendum the General Assembly chose to ignore by adopting this Act.

VIII. THE TRIAL COURT ERRED BY DENYING BROOKS ET AL. PRE- AND POST-JUDGMENT MOTIONS TO AMEND PLEADINGS TO CONFORM TO THE EVIDENCE BECAUSE RULE 55.33 CONTEMPLATES SUCH AN AMENDMENT IN THAT THE TESTIMONY OF STATE'S WITNESSES RAISED NEW HANCOCK VIOLATIONS.

Brooks et al. stand on the argument in their initial Brief as this issue is relatively minor compared to the constitutional concerns before this Court.

CONCLUSION

The State has gone to considerable lengths to convince this Court it should avoid ruling on the merits of the constitutional issues presented.

The State's tactics run the gamut: from schoolyard vernacular in referring to concerns about decriminalization of gun laws as "chicken little" (States Reply Brief, page 12, note 1) to vigorously opposing the amendment of pleadings; a matter often done by consent or routinely granted under this Court's rules, even after judgment has been entered. (State's Reply Brief, pages 64-68).

The State has repeatedly sought to hasten the proceedings in this Court and now, in its Reply Brief, urges again and again that the Court not go to the merits of the case. Brooks et al. urge this Court to bypass the State's obtrusiveness and deliberate the very heart of the constitutional issues involved in this case. Despite the protest of their Attorney General, the citizens of Missouri deserve a definitive ruling "up or down."

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Certification of Service and Compliance with Rule 84.06 (B) and (c)

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule 84.06(b), and that the brief contains 7,562 words.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

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