IN THE SUPREME COURT OF MISSOURI

No. SC85674

ALVIN BROOKS, et al.,
Respondents,

v.

STATE OF MISSOURI, et al.,
Appellants.

Petition For Review
From The Circuit Court of the City of St. Louis,
The Honorable Steven R. Ohmer

Reply Brief and Cross-Appeal Respondents' Brief of Appellants State of Missouri and Attorney General

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Jurisdictional Statement

Plaintiffs in this case have failed to file or perfect a timely Notice of Appeal. Accordingly, this Court lacks jurisdiction to consider that appeal, and it must be dismissed. *Goldberg v. Mos*, 631 S.W.2d 342, 345 (Mo. 1982); *Fagan v. Hamilton Bank*, 327 S.W.2d 201, 202 (Mo. 1959).

Contemporaneous with the filing of this Brief, the State has filed a Motion to Dismiss Plaintiffs' Cross-Appeal, to Strike Portions of Plaintiffs' Brief, and to Alter or Amend This Court's Scheduling Order. Because Plaintiffs failed to perfect their appeal, their initial Brief, filed on December 24, 2003, styled "Brief of Respondents and Cross-Appellants," was nothing more than a Respondents' Brief. The portions of that Brief inappropriate to that role must be stricken. *See* Rule 84.04(f).

Plaintiffs' Points I, II, and III of their Brief respond to the issues raised in the State's appeal, and this Reply Brief addresses those issues in Points I, II, and III below.

Plaintiff's Points IV, VI and VII of their Brief are styled as cross-appeal points, but cannot be such because Plaintiffs have defaulted any cross-appeal opportunity they may have had. But, to the extent that this Court wishes to consider the issues raised by Plaintiffs' in their Points IV, VI and VII as alternative bases for affirming the Circuit Court's judgment under Rule 84.04(f), this Reply Brief addresses those issues in Points IVa, IVb, IVc, VI, and VII below.

With respect to Plaintiffs' Points V and VIII, however, these cannot be considered "additional argument[s] in support of the judgment" under Rule 84.04(f) in that these Points seek to have this Court overturn the Circuit Court's decision not to allow Plaintiffs to amend their petition after trial and after judgment to raise new constitutional theories. Plaintiffs have abandoned these issues by not filing a Notice of Appeal, and these issues cannot now be asserted. This is addressed in Point V of this Reply Brief, as are the merits of Plaintiffs' claim should this Court wish to consider it even though this Court lacks jurisdiction to do so.

The State's motion also seeks to have this Court modify its scheduling order in this matter to ensure that the Plaintiffs do not file a second brief – an opportunity to which Plaintiffs' status as Respondents does not entitle them – which the original scheduling contemplated on the assumption that Plaintiffs would perfect their appeal.

Reply to Plaintiffs' Statement of Facts

Plaintiffs' statement of facts (Plaintiffs' Brief at 17-32) is an abuse of Rule 84.04(c) and (f) and should be stricken or – better yet – ignored.

Rule 84.04(c) permits and requires a statement of "the facts that are relevant to the questions presented for determination without argument." Instead, Plaintiffs present a long-winded rant against the 2003 Amendments and why, in their view, the General Assembly was unwise to enact them. In doing so, Plaintiffs:

– repeatedly misstate and misinterpret existing law;

– repeatedly misstate and misinterpret the 2003 Amendments and their effect;[1]

– move to strike without basis a portion of the State's Opening Brief.

The State cannot and will not debate Plaintiffs on every aspect of the existing law and every conceivable application of the 2003 Amendments. In the words of the Circuit Court, "[T]he law is what it is . . .," (L.F. at 381), and where existing law or the provisions of the 2003 Amendments are relevant to a matter actually being litigated, they are fairly described in the State's Opening Brief and in this Brief.

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[1] Plaintiffs' repeated, chicken-little warnings of pipe bombs and hand grenades in schools and day cares apparently overlook §571.020, which makes it a felony to possess an explosive device.

With respect to the Plaintiffs' motion to strike references to the Governor's Veto Message regarding the 2003 Amendments (Plaintiffs' Brief at 30),[2] it is worth noting that there is "no evidence in the record" of the text of the 2003 Amendments, either. Plaintiffs never introduced House Bill 349 at trial. Yet, constant reference has been (and must be) made to it. Like the 2003 Amendments, the Governor's Veto Message is an official public document, readily available (http://www.gov.state.mo.us/legis03/HB349vl.htm), and the Court may take such notice as it deems appropriate. *Cf. Brown v. Morris*, 290 S.W.2d 160, 167 (Mo. banc 1956) (Court may take judicial notice of legislative journals).

[2] Notwithstanding their motion to strike the State's reference to this Veto Message, the Plaintiffs apparently had no objection to their own use of this document. *See* Plaintiffs' Brief at 111. As noted above, both the State's and the Plaintiffs' reference are permissible.

Points Relied On

Point I – Article I, Section 23

The Circuit Court erred in granting a permanent injunction and in declaring the 2003 Amendments to be unconstitutional because those amendments do not "clearly and undoubtedly" contravene, nor "plainly and palpably" affront, Article I, Section 23, of the Missouri Constitution in that the 2003 Amendments are merely an exercise by the General Assembly of its authority to regulate the time, place, and manner of bearing arms – authority that Article I, Section 23 reserves and preserves.

Linton v. Missouri Veterinary Medical Board, 988 S.W.2d 513 (Mo. banc 1999)

Three River Junior College District of Poplar Bluff v. Statler,

421 S.W.2d 235 (Mo. banc 1967)

State v. Wilforth, 74 Mo. 528 (1881)

Mo. Const. art. I, § 23

Point II – Improper Venue

The Circuit Court erred in denying the defendants' motion to transfer venue, because venue was proper only in the Circuit Court of Cole County in that, at the time plaintiffs filed their petition, the only defendants were the State of Missouri and the Attorney General, both of whom may be found only in Cole County, and the

plaintiffs' subsequent joinder of a defendant from the City of St. Louis was pretensive.

Capital City Bank v. Knox, 47 Mo. 333 (1871)

Hefner v. Dausmann, 996 S.W.2d 660 (Mo. App. 1999)

Point III – Costs Improperly Assessed

The Circuit Court erred in taxing costs "to the Defendants" because sovereign immunity applies, in that the defendants were the State and its Attorney General sued in his official capacity.

Point IVa – No Statewide Hancock Remedy

The Circuit Court did not err in refusing to declare the 2003 Amendments unconstitutional, or to enjoin their taking effect statewide, under the "unfunded mandate" provisions of the Hancock Amendment (Article X, Sections 16 and 21) because such a claim provides no basis for enjoining a statute statewide in its entirety in that the only remedy available under the Hancock Amendment is to suspend a political subdivision's obligation to perform new or expanded duties until adequate funds are provided.

City of Jefferson v. Missouri Dept. of Natural Resources,

863 S.W.2d 844 (Mo. banc 1993)

City of Jefferson v. Missouri Dept. of Natural Resources,

916 S.W.2d 794 (Mo. banc 1996)

Fort Zumwalt School District v. State, 896 S.W.2d 918 (Mo. banc 1995)

Mo. Const. art. X, §§ 16 and 21

Point IVb – Hancock Claim Not Justiciable

The Circuit Court did not err in refusing to declare the 2003 Amendments unconstitutional, or to enjoin their taking effect, under the "unfunded mandate" provisions of the Hancock Amendment (Article X, Sections 16 and 21) because such a claim is not presently justiciable in that it is based solely upon speculative future duties and expenses, and in that Plaintiffs lack standing to bring it.

State ex rel. Nixon v. American Tobacco Co., 34 S.W.3d 122 (Mo. banc 2000)

Miller v. Director of Revenue, 719 S.W.2d 787 (Mo. banc 1986)

City of Jefferson v. Missouri Dept. of Natural Resources,

916 S.W.2d 794 (Mo. banc 1996)

Mo. Const. art. X, §§ 16 and 21

Point V – Denial of Motion to Amend to Raise New Hancock Claim

The Circuit Court did not err in refusing to declare the 2003 Amendments unconstitutional, or to enjoin their taking effect, under the Hancock Amendment (Article X, Section 22) because Plaintiffs' Second Amended Petition raised no such claim, nor was such claim tried by consent, in that Plaintiffs twice sought leave after

trial to amend their Petition to add these new claims and the Trial Court twice properly denied Plaintiffs leave to amend.

Division of Employment Security v. Taney County District R-III,

922 S.W.2d 391 (Mo. banc 1996)

County of Jefferson v. QuikTrip Corporation,

912 S.W.2d 487 (Mo. banc 1995)

City of Jefferson v. Missouri Dept. of Natural Resources,

916 S.W.2d 794 (Mo. banc 1996)

Mo. Const. art. X, §22

Point VI – Vagueness

The Circuit Court did not err in refusing to declare the 2003 Amendments unconstitutional, or to enjoin their taking effect statewide, under the "void for vagueness" doctrine because such a claim is not justiciable and lacks merit in that Plaintiffs lack standing to raise this claim and the 2003 Amendments provide adequate notice of the conduct being regulated.

Harrison v. Monroe County, 716 S.W.2d 263 (Mo. banc 1986)

State v. Van Horne, 622 S.W.2d 956 (Mo. 1981)

State v. Ellis, 853 S.W.2d 440 (Mo. App. 1993)

Point VII – Article I, Section I

The Circuit Court did not err in refusing to declare the 2003 Amendments unconstitutional, or to enjoin their taking effect statewide, under Article I, Section 1, because the 2003 Amendments were a proper exercise of the political power in that the General Assembly that enacted the 2003 Amendments was duly elected by the people of the State and thus the political power for the enactment of the 2003 Amendments it was in fact derived from the people, and the General Assembly properly exercised it.

Three Rivers Junior College District of Poplar Bluff v. Statler,

421 S.W.2d 235 (Mo. banc 1967)

Argument

Point I – Article I, Section 23

The Circuit Court erred in granting a permanent injunction and in declaring the 2003 Amendments to be unconstitutional because those amendments do not "clearly and undoubtedly" contravene, nor "plainly and palpably" affront, Article I, Section 23, of the Missouri Constitution in that the 2003 Amendments are merely an exercise by the General Assembly of its authority to regulate the time, place, and manner of bearing arms – authority that Article I, Section 23 reserves and preserves.

(In further support of the State's Point I)

Plaintiffs do not like the 2003 Amendments. That much is clear. But rather than express their displeasure in the political arena by working to amend or repeal these provisions – an arduous task in which one must actually demonstrate, rather than merely assert, that the "will of the people" has been denied – Plaintiffs seek to have this Court do their work for them. This Court's precedents, however, and the respect for the separation of powers that the Constitution demands, must defeat their claims.

This Court has made it abundantly clear that litigants must come before this Court armed with more than the belief that a law is unwise when seeking to have an act of the General Assembly struck down. These Plaintiffs have failed. Armed with nothing more than a tortured misreading of ten words in Article I, Section 23, Plaintiffs have succeeded

in derailing the 2003 Amendments for more than three months. Now, it is for this Court to reject their claims and clear the way for "the will of the people," expressed by an overwhelming majority of their elected representatives in the General Assembly to take effect.

A. Standard of review and presumption of constitutionality

Because they have not (and cannot) overcome it, Plaintiffs ignore the strong presumption of constitutionality this Court has always afforded to acts of the General Assembly. But this Court has long held that "constitutional restrictions ought not to be held to apply if there exists any reasonable doubt in the judicial mind as to a conflict." *Wilson v. Washington County*, 247 S.W. 185, 187 (Mo. 1922). "[T]he judicial branch . . . [must] avoid the temptation to substitute its preferred policies for those adopted by the elected representatives of the people." *Spradlin v. City of Fulton*, 924 S.W.2d 259, 263 (Mo. banc 1996).

This is precisely why Plaintiffs, in attacking the 2003 Amendments, "bear[] an extremely heavy burden." *Linton v. Missouri Veterinary Medical Board*, 988 S.W.2d 513, 515 (Mo. banc 1999). As set forth below, Plaintiffs have failed to carry this burden because they have to failed to demonstrate that the 2003 Amendments "clearly and undoubtedly contravene[] the constitution," much less that they "plainly and palpably affront[] fundamental law embodied in the constitution." *Etling v. Westport Heating & Cooling Svs., Inc.*, 92 S.W.3d 771, 773 (Mo. banc 2003).

B. The plain language of Article I, Section 23, recognizes and preserves the General Assembly's authority to regulate concealed weapons.

After more than a hundred pages of Plaintiffs' fervent claims regarding the evils they believe will be worked by the 2003 Amendments and the violence that Plaintiffs assert the 2003 Amendments will work on the "essence" of Article I, Section 23, it is easy to lose sight of the plain, simple language of that provision. It states:

> That the right of every citizen to keep and bear arms in defense of his home, person and property, or when lawfully summoned in aid of the civil power, shall not be questioned; but this does not justify the wearing of concealed weapons.

This provision does not "create" any rights; it does not "grant" any rights; it does not permit or require individuals to do anything; nor does it prohibit individuals from doing anything. Instead, it protects "the right of every citizen to keep and bear arms in defense of his home, person and property" from governmental intrusion. As with all of the provisions in the Bill of Rights, it speaks only to the General Assembly, and states quite emphatically what the General Assembly cannot do. But, in prohibiting the General Assembly from infringing the "right to keep and bear arms," the framers saw fit to exclude from this prohibition the General Assembly's authority to regulate "the wearing of concealed weapons." There, just as with the entire range of human conduct not protected elsewhere in the constitution, the General Assembly may act with whatever

degree of regulation it deems appropriate. That is the plain meaning of Article I, Section 23 . . . no more, and no less.

Plaintiffs assert that the State "offers no actual interpretation of the meaning of Article I, Section 23 as a whole." Plaintiffs' Brief at 39. They are wrong. The construction set forth above was painstakingly demonstrated in the State's Opening Brief at pages 32-34. The following is a recap of the plain meaning of the last ten words of Article I, Section 23:

"**but**"	a conjunction connoting a limitation;
"**this**"	a referent, *i.e.*, that which is limited; in this case, "the right to keep and bear arms"
"**does not justify**"	does not "prove," does not "show to be just," does not "show to be valid," or does not "show to have had sufficient legal reason"

"**the carrying of concealed weapons.**"

Plaintiffs, by contrast, offer many and various "plain language" readings of this phrase – but rely on words that are not there. Plaintiffs would have this Court rewrite the

language to read: "except that they[2] shall not wear concealed weapons." Plaintiffs' Brief at 38.

Had the framers intended the second clause to be a prohibition on the carrying of concealed weapons, the framers would have said so – maybe even using the words that Plaintiffs now suggest.[3] But the framers did not use those words; and did not enshrine in

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[2] As Plaintiffs use the term, "they" means "citizens," but apparently only when they are acting as "civilians." *See* Plaintiffs' Brief at 40 fn 2. Of course, neither "they" nor "civilians" is the subject of the last clause of Article I, Section 23; "this" is the subject, and "this" refers to the right being protected, not the citizens themselves. The predecessor to the word "this" in Article I, Section 23 of the 1945 Constitution more explicitly – if less succinctly – referred to the right being protected: "this" had been substituted for "nothing herein contained." *See* Mo. Const. art. 2, §17 (1875). App. A43. Of course, the change to the provision was not substantive, it was in the nature of modernization of the language. *See* 1943-1944 Constitutional Convention of Missouri, File No. 8, Report No. 1 of "Committee No. 23 on Phraseology, Arrangement and Engrossment. Preamble and Articles I and II," p. 10.

[3] Below, plaintiffs relied heavily on their assertion that the provision had been amended in 1945 to include the topical title "Right to Keep and Bear Arms – Exception." But as the State proved, that topical title is not part of Article I, Section 23 of the 1945 Constitution. *See* LF 157-158 (Affidavit of Kenneth H. Winn, State Archivist). The

our constitution the permanent and immutable ban on individuals' conduct – the wearing of concealed weapons anywhere, anytime, by anyone – that Plaintiffs now claim they can see in the "plain language" of Article I, Section 23.

C. The debates of the constitutional conventions support the General Assembly's authority to regulate concealed weapons preserved by the last clause of Article I, Section 23.

Plaintiffs concede that, although the constitutional debates may be illustrative of the framers' intent, they are not controlling of the meaning of a provision, nor do they have binding force on the courts.[4] *Metal Form Corp. v. Leachman,* 599 S.W.2d 922, 926 (Mo. banc 1980). Plaintiffs nevertheless urge the Court to adopt their "re-draft" of Article I, Section 23, based on their view of the debates and the historical context. *See* Plaintiffs' Brief at 53-54. In truth, the Constitutional Debates provide no more support for Plaintiffs' argument than does the text of Article I, Section 23, so Plaintiffs have "re-drafted" the debates as well.

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topical title did not appear on the ballot submitted to the voters, nor in the original 1945 Constitution, but was drafted and added sometime later by a member of the Committee on Legislative Research. *Id*.

[4] Indeed, resort to the constitutional debates is inappropriate where, as here, the language of a constitutional provision is clear on its face. *State ex rel. Heimberger v. Bd. of Curators of University of Missouri*, 188 S.W. 128, 131 (Mo. banc 1916).

As the State pointed out in its opening brief, delegates to Missouri's constitutional convention of 1875 were aware that, in Kentucky, a garden-variety "right to keep and bear arms" provision had been judicially construed to prohibit any legislative regulation of the practice of carrying concealed weapons. *See Bliss v. Commonwealth*, 2 Litt. 90 (Ky. 1822). Or, to quote Delegate Gantt: "I need not call the attention of my brethren of the bar to the fact that in one, at least, of the states of the Union, the decision was made that a provision in the Constitution declaring that the right of any citizen to bear arms shall not be questioned, prohibited the Legislature from preventing the wearing of concealed weapons." Appendix to the State's Opening Brief (referred to herein as "App.") at A19.

The Missouri Supreme Court at that time had not yet addressed the *Bliss* issue, and Delegate Gantt clearly articulated that the intent of adding the concluding phrase was to prevent any possibility of precisely such an overbroad interpretation from occurring in Missouri.[5] Gantt's words plainly evidence that he understood, as Plaintiffs do not, that it is for the legislature to regulate the wearing of concealed weapons and that the purpose of the new concluding phrase was to ensure that the legislature's authority to do so was not thwarted by the Bill of Rights. By "regulate," Gantt quite possibly believed that the

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[5] The Delegates' inclusion of this clause worked. In 1881, this Court rejected the *Bliss* holding and affirmed that the General Assembly could regulate concealed weapons. *See State v. Wilforth,* 74 Mo. 528 (1881).

legislature should ban the practice completely – for everyone, everywhere, all of the time. But Gantt did not argue that the Constitution did so, or that it should do so. Perhaps Gantt would be displeased by the 2003 Amendments, just a Plaintiffs are, but nothing in his speech to the Convention indicates that he would join Plaintiffs in their argument that the 2003 Amendments are unconstitutional under Article I, Section 23.

Accordingly, to the extent that the debates are relevant at all, the remarks of Delegate Gantt are fully consistent with the State's construction of the concluding phrase of Article I, Section 23, as a preservation of the legislature's authority to regulate concealed weapons.

D. Missouri courts have always recognized the General Assembly's authority to regulate concealed weapons.

As demonstrated in the State's opening brief, the decisions of this Court and the Court of Appeals uniformly acknowledge the General Assembly's authority to regulate concealed weapons. *See* State's Opening Brief at pp. 41-43. Plaintiffs have not pointed to a single decision stating, or even suggesting, that the Missouri Constitution itself – rather than the General Assembly – prohibits the carrying of concealed weapons or establishes the limits of any exceptions to such a prohibition. This is because there are none, and there are none because the courts recognize, as Plaintiffs do not, that the General Assembly's authority to regulate this practice is unaffected by Article I, Section 23.

E. The General Assembly and Executive Branch have always recognized the General Assembly's authority to regulate concealed weapons.

Plaintiffs concede that the "General Assembly has enacted numerous laws banning concealed weapons," Plaintiffs' Brief at 52, but nowhere even attempt to explain how or why the General Assembly could do so if – as they claim – the practice of carrying concealed weapons was already prohibited by Article I, Section 23.

Plaintiffs even approve, apparently, of the General Assembly's "authorizing concealed weapons in limited circumstances," Plaintiffs' Brief at 52, but nowhere attempt to explain how or why the General Assembly could do so in light of the blanket prohibition against concealed weapons that Plaintiffs claim must be found in Article I, Section 23. To be consistent, Plaintiffs must challenge the validity of all exceptions, but they do not.

The reason for these stunning inconsistencies is simple: Plaintiffs like – or at least accept – the policy decisions of prior General Assemblies regarding their regulation of concealed weapons, but do not approve of the scope of the new exception to the law prohibiting concealed weapons that the 2003 Amendments enact. It is that simple.

Plaintiffs' argument misstates, or misapprehends, the scope of earlier exceptions to the legislative ban on concealed weapons. *See* Plaintiffs' Brief at 60-61. The General Assembly's first relevant act after the Constitution of 1875 was adopted was to significantly broaden the exceptions and expand the circumstances in which citizens

could lawfully carry concealed weapons – an expansion that would not have been possible if Article I, Section 23, meant what Plaintiffs now claim it means.

The 1874 law forbade the carrying of concealed weapons in a variety of places, but excepted "any person whose duty it is to bear arms in the discharge of duties imposed by law." Laws 1874, p. 43 (approved March 26, 1874). Four years after the passage of the 1875 Constitution, the General Assembly broadened the exceptions, enacting §1274 and §1275, Revised Statutes 1879. In pertinent part, the 1879 law expanded the exceptions to allow for concealed carry by <u>any person</u> who could show "that he has been threatened with great bodily harm, or had good reason to carry the same in the necessary defense of his person, home or property." Sec. 1275. The 1879 expansion of concealed weapons is of significance to the interpretation of the constitutional provision at issue because legislative and gubernatorial construction of the constitution, while not binding on a court, is "entitled to much weight." *State ex rel. Major v. Patterson*, 129 S.W. 888, 890 (Mo. banc 1910). *See also Gantt v. Brown*, 149 S.W. 644, 646 (Mo. banc 1912) (construction is especially persuasive when it occurs soon after adoption of constitutional provision).

Though renumbered a few times, the laws enacted in 1879 stayed in place for over three decades. In 1909, they were repealed and replaced with language more similar to the 1874 version, but which provided for a new category of persons to whom the ban on carrying concealed weapons did not apply: "legally qualified sheriffs, police officers and

other persons whose bona fide duty is to execute process, civil or criminal, make arrests, or aid in conserving the public peace, . . . [or] to persons traveling in a continuous journey peaceably through this state." Laws of 1909, p. 452 (emphasis added). *See State v. Gentry*, 242 S.W. 398, 399 (Mo. 1922) (tracing changes in concealed weapons statutes), and *State v. Keet*, 190 S.W. 573, 576 (Mo. 1916) (same).

As noted above, there is a glaring inconsistency between Plaintiffs' claim that Article I, Section 23 is an absolute and immutable constitutional ban on concealed weapons, and Plaintiffs' reluctance to concede that if there is such a ban, then all legislatively created exceptions must therefore be invalid. Plaintiffs try to cure this inconsistency by arguing that the prohibition in Article I, Section 23 is "addressed to citizens at large – citizens in their capacity as citizens" – and does not extend to "persons who, though they may also be citizens, are acting in roles of authority regarding the public safety or in the capacity as agents of the state." *See* Plaintiffs' Brief at 40 n.4. The "travelers" exception, added in 1909 with repeated judicial approval to the present day, *see State v. Murray*, 925 S.W.2d 492 (Mo. App. 1996), however, disposes of Plaintiffs' too-clever-by-half evasion. The travelers exception is not limited to "citizens," nor is it limited to persons who are "acting in the roles of authority regarding public safety." Yet Plaintiffs implicitly concede its validity by failing to challenge it.

The same can be said regarding the exception for any person with "good reason to carry [a concealed weapon] in the necessary defense of his person, home or property."

See Section 1275, Revised Statutes 1879. This exception – added just four years after the language on which Plaintiffs now rely was added to Article I, Section 23 – flies directly in the face of Plaintiffs' bizarre "prohibition-but-only-on-'citizens'" construction. This "good reason" exception is not limited to "citizens," nor is it limited to persons who are "acting in the roles of authority regarding public safety." This exception lasted nearly 30 years, during which no one even suggested that it violated the constitution. Plaintiffs – if they were at all consistent – would have to argue that the 1879 General Assembly violated Article I, Section 23, while the ink was still wet . . . but Plaintiffs cannot bring themselves to do so.

Plaintiffs are not free to pick and chose which acts of the General Assembly they will deem to be valid. Either the General Assembly has authority to enact whatever prohibitions and exceptions it deems appropriate, or it lacks authority to enact any exceptions. Their construction of Article I, Section 23, litters the legal landscape with legislative enactments that must be declared invalid. The State's construction instead preserves both the integrity of Article I, Section 23, and these legislative enactments.

F. Plaintiffs' arguments find no support in the constitutions or judicial decisions of other states, which uniformly reject Plaintiffs' theory.

Unable to find any support for their claim in the text of Article I, Section 23, or in the constitutional debates, or in the statutes or caselaw of this state, Plaintiffs look for

solace in the constitutions of other states. Even there, Plaintiffs ignore what they cannot overcome.

The Colorado Constitution., art. II, § 13 is very similar to Missouri's Article I, Section 23. It provides: "The right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto legally summoned, shall be called in question; *but nothing herein contained shall be construed to justify the practice of carrying concealed weapons*." (Emphasis added.) Permits for concealed weapons are provided for in Colo. Rev. Stat § 18-12-201, *et seq.*, and the Colorado Supreme Court has confirmed the Colorado legislature's authority to so regulate: "Whether the legislature or municipality shall choose to delegate or create the power to issue permits [to carry concealed weapons] is a matter of legislative policy." *Douglass v. Kelton*, 199 Colo. 446, 449, 610 P.2d 1067, 1069 (1980).

Even those state constitutions that explicitly – albeit unnecessarily – refer to the legislature's authority to regulate concealed weapons provide no relief for Plaintiffs. The Supreme Court of North Carolina has made perhaps the most apposite statement in this regard. The North Caroline Constitution, Art. 1, § 30, states in part: "A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed . . . . *Nothing herein shall justify the practice of carrying concealed weapons, or prevent the General Assembly from enacting penal statutes against that practice*." (Emphasis added.) The North Carolina legislature has enacted a

process for issuing permits for concealed weapons, *see* N.C. Gen. Stat. § 14.415.10, and the North Carolina Supreme Court has held: "This [constitutional] exception indicates the extent to which the right of the people to bear arms can be restricted; that is, the Legislature can prohibit the carrying of concealed weapons, but no further." *State v. Kerner*, 181 N.C. 574, 575, 107 S.E. 222, 223 (1921). But that court has emphasized that the constitutional reference to the legislature's power to "enact penal statutes against carrying concealed weapons was undoubtedly 'a matter of superabundant caution, inserted to prevent a doubt," and that – even without the clause – the legislature could still regulate concealed weapons under its "police powers." *State v. Dawson*, 272 N.C. 535, 548, 159 S.E.2d 1, 11 (1968) (emphasis added).

Even the new year of 2004 has started off badly for the Plaintiffs. Another state supreme court, this time in New Mexico, has squarely rejected Plaintiffs' view. The New Mexico Supreme Court, on January 5, 2004, held that the corresponding clause in New Mexico's constitutional "right to bear arms" provision, which states "but nothing herein shall be held to permit the carrying of concealed weapons," N.M. Const. art. II, § 6, was a not general prohibition against concealed weapons or a restriction on the legislature's authority to permit that practice as it saw fit.[6]

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[6] *See* Supreme Court Lets Concealed Gun Law Stand, Santa Fe New Mexican, January 6, 2004 (**http://www.sfnewmexican.com**). The New Mexico Supreme Court has not yet issued an opinion. When an opinion is available, however, the State will provide a

G. The 2003 Amendments are not unconstitutional under Plaintiffs' theory that the first clause of Article I, Section 23, bars them.

Plaintiffs offer this theory "in support of the judgment" under Rule 84.04(f), even though it was not developed before the Circuit Court. If this Court wishes to address this claim on that basis, it should quickly reject it. In short, Plaintiffs' new theory is that Article I, Section 23, "grants a limited right . . . only for self defense purposes." Plaintiffs' Brief at 62. Plaintiffs then assert that the 2003 Amendments will"diminish[] the safety of Missouri citizens," and thus violate "their rights of defense guaranteed by Article I, Section 23." Plaintiffs' Brief at 64.

This Court should not permit the Plaintiffs to convert this lawsuit into a forum for debating whether the availability of concealed weapons renders society more or less safe. Such a debate is relevant only to the General Assembly in determining how to exercise its legislative power in this area – power left undisturbed by Article I, Section 23. That debate is not relevant to any issue this Court can legitimately consider.

As the State has repeatedly pointed out, Article I, Section 23, does not grant any rights, let alone a right of "self defense." It does not guarantee Missourians a defense, or safety, or anything else . . . except that the General Assembly will not infringe upon their "right to keep and bear arms in defense of his home, person and property." Instead, "[p]rovisions of a Bill of Rights are primarily limitations on government, declaring rights

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copy to the Court.

that exist without any governmental grant, that may not be taken away by government and that government has the duty to protect." *Quinn v. Buchanan,* 298 S.W.2d 412 (Mo. 1957).

Plaintiffs' nonsensical argument appears only to have been inserted by Plaintiffs as a pretext for injecting into this case an issue that they have been unable to advance heretofore, *i.e.*, that the 2003 Amendments will make society less safe. Plaintiffs spend no less than twelve pages making this point – stretching the facts and misstating the 2003 Amendments and existing law where necessary or convenient. Now that it is out of their system, however, this Court should ignore it (and the pretextual constitutional "theory" they used in order to justify voicing their policy claims) because it is not relevant to any legal issue before this Court.

Point II – Improper Venue

The Circuit Court erred in denying the defendants' motion to transfer venue, because venue was proper only in the Circuit Court of Cole County in that, at the time plaintiffs filed their petition, the only defendants were the State of Missouri and the Attorney General, both of whom may be found only in Cole County, and the plaintiffs' subsequent joinder of a defendant from the City of St. Louis was pretensive.

(In further support of the State's Point II)

There has never been a more obvious violation of the rule against pretensive joinder than the present case. As the Circuit Court literally was preparing to order this case transferred, Plaintiffs sought leave to add St. Louis City Sheriff Murphy as a defendant. They made no allegations particular to the Sheriff, nor stated any claim unique to him, nor sought any relief with respect to him other than that which they had already sought in their original petition. Then, after his pretensive addition had secured for Plaintiffs their improper venue, Plaintiffs proceeded to ignore Sheriff Murphy for the remainder of the case. The did not call him as a witness, and made no evidentiary showing of what his duties are or would be under the 2003 Amendments. Plaintiffs were unable to respond to the State's point that the City of St. Louis sheriff, unique among sheriffs across the state, does not even generally enforce the criminal laws of the state, *see* Section 57.450, RSMo 2000, even though the Sheriff's counsel told the court and the

parties as much well before trial. *See* Tr. Vol. 1, pp. 26-27. In short, Plaintiffs acted as though Sheriff Murphy were not a party . . . because he was not.

Whether there may be circumstances under which the State may be made a party to a suit in a venue other than the Circuit Court of Cole County is not at issue in this case. *See* Plaintiffs' Brief at 73. The issue is that no defendant, including the State, should be hailed into a court of improper venue by means of pretense. Missouri courts have recognized as much for at least 130 years. *See Capital City Bank v. Knox*, 47 Mo. 333 (1871). The Circuit Court's decision to deny the State's motion to transfer was error.

Contrary to plaintiffs' representation, *see* Plaintiffs' Brief at 75, this Court has affirmed the disjunctive nature of the test for pretensive joinder, *State ex rel. Breckenridge v. Sweeney*, 920 S.W.2d 901, 902 (Mo. banc 1996), as did the Court of Appeals, *Lynch v. Blanke Baer & Bowey Krimko, Inc.*, 901 S.W.2d 147, 153 (Mo. App. 1995). A court will look to the pleadings on their face, or to the record, in support of the motion claiming pretensive joinder. *Breckenridge, supra* and *Lynch, supra*. *See also* Appellants' Brief, pp. 54-55 (citing *Hefner v. Dausmann,* 996 S.W.2d 660, 664 (Mo. App. 1999)).

At no time did the Sheriff substantively participate in the lower court proceedings. Now, again on appeal, plaintiffs fail to cite one case, one statute, or one piece of evidence that demonstrates why or how they have stated a claim against this defendant. *See* Plaintiffs' Brief at 76-77. The only purpose that plaintiffs served in bringing the St.

Louis sheriff before the lower court was to avoid transfer of venue to the court of proper venue, Cole County Circuit Court. The lower court erred in failing to find his joinder was pretensive.

The State reiterates, however, that this error must not result in vacating the Circuit Court's judgment and remanding the case to St. Louis so that it can be transferred to Jefferson City so that all the litigants can start this painful process anew. Such a "remedy" would be an absurd conclusion to these proceedings. Instead, the State seeks only to have this Court affirm that Sheriff Murphy's joinder was pretensive, that the Circuit Court should have transferred, and that similar occurrences in the future can be remedied in the only just manner, *i.e.*, by writ of prohibition.[7] In fact, a remedy in this appeal that would require the state to suffer a "do-over" and further delay is not adequate – which is why the State has expressly eschewed that remedy. Without this relief, these unlawful pretensive joinders are likely to continue without any meaning appellate review.

[7] The State's petition for a writ of prohibition was denied by this Court on the ground that an adequate remedy was available by appeal. *See* case no. SC85619.

Point III – Costs Improperly Assessed

The Circuit Court erred in taxing costs "to the Defendants" because sovereign immunity applies, in that the defendants were the State and its Attorney General sued in his official capacity.

(In further support of the State's Point III)

Plaintiffs concede that the trial court incorrectly assessed costs against the State and Attorney General. Plaintiffs' Brief at 79. Their Hancock arguments – which have been rejected three times below – are addressed elsewhere in this brief. In light of Plaintiffs' concession with regard to Point III and the lack of merit to any of their Hancock arguments, plaintiffs are not entitled to costs under any circumstances.

Point IVa – No Statewide Hancock Remedy

The Circuit Court did not err in refusing to declare the 2003 Amendments unconstitutional, or to enjoin their taking effect statewide, under the "unfunded mandate" provisions of the Hancock Amendment (Article X, Sections 16 and 21) because such a claim provides no basis for enjoining a statute statewide in its entirety in that the only remedy available under the Hancock Amendment is to suspend a political subdivision's obligation to perform new or expanded duties until adequate funds are provided.

(Responds to Point IV of Plaintiffs' "Cross Appeal")[8]

Plaintiffs' Hancock Amendment claim under Article X, Sections 16 and 21, proceeds from an assumption that the Hancock Amendment can be used to invalidate an entire legislative enactment statewide if any part of that enactment could potentially impose any "unfunded mandate" on any political subdivision anywhere in the state. They are wrong. Even if they had proven their claim – which they did not – such proof would

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[8] As noted in the Jurisdictional Statement of this Brief, *supra*, the Plaintiffs have not filed a timely Notice of Appeal in this matter. Hence, there is no "Cross Appeal," and Plaintiffs are not entitled to any appellate relief of any kind. Nevertheless, the State responds to the issues raised in Point IV of Plaintiffs' Brief only to the extent that this Court may wish to address those issues as having been offered by the Plaintiffs under Rule 84.04(f).

not provide a basis for preventing the implementation of the 2003 Amendments in their entirety statewide.

No statute has ever been "declared unconstitutional," or has ever had its "enforcement" enjoined statewide, or has ever been "struck down," under the Hancock Amendment, Article X, Sections 16 and 21. At most, a political subdivision (or taxpayer of a political subdivision) who appears in court, and proves specifically the state-mandated new or increased activities or services, and the actual costs already incurred in performing them, is entitled only to have the political subdivision's obligation to comply with the new mandate suspended until the State provides adequate funds to defray the additional costs. Accordingly, regardless of the evidence, the Circuit Court was correct as a matter of law in refusing to enjoin the enforcement of the 2003 Amendments statewide, or declare them void, under Article X, Sections 16 and 21.[9]

Many of this Court's decisions speak to the remedy available under Article X, Sections 16 and 21, but none as clearly as *City of Jefferson v. Missouri Dept. of Natural*

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[9] Not only do Plaintiffs' Hancock arguments not afford a statewide remedy, they apply only to a part of the 2003 Amendments, the part concerning the license to carry. New Section 571.030.3 (transporting a concealable firearm in a motor vehicle) does not. App. at A26-A27. The legislature is presumed to intend that effect be given to all parts of an act that are not invalidated. *Akin v. Director of Revenue,* 934 S.W.2d 295, 300-301 (Mo. banc 1996).

Resources, 863 S.W.2d 844, 848 (Mo. banc 1993) (referred to herein as *City of Jefferson I*), and *City of Jefferson v. Missouri Dept. of Natural Resources*, 916 S.W.2d 794 (Mo. banc 1996) (referred to herein as *City of Jefferson II*). In *City of Jefferson I*, this Court held that it "will not presume increased costs resulting from increased mandated activity," and remanded for trial. *City of Jefferson I*, 863 S.W.2d at 849.

Upon remand and after trial, the Circuit Court found that Jefferson City had proved the new or additional duties mandated of it, and the actual costs such new duties imposed. The Circuit Court then ordered the new law to be enjoined statewide in its entirety. *City of Jefferson II*, 916 S.W.2d at 794. This Court affirmed the lower court's finding, but dramatically limited the remedy imposed. Rather than affirming any statewide relief, this Court ordered only that the "mandate that Jefferson City comply with [the offending statute] is suspended until the General Assembly actually appropriates funds to pay the [increased costs]." *City of Jefferson II*, 916 S.W.2d at 797.

Then, in a passage that dooms Plaintiffs' claims in the present case, this Court went on to hold that, "to the extent the circuit court's judgment purports to apply to political subdivisions <u>other</u> than Jefferson City, or to subjects <u>other</u> than the [offending statute's] mandate, it is reversed." *Id*. (emphasis added). This was because "there is no <u>evidence</u> that any political subdivision other than Jefferson City experienced increased costs . . . . Only Jefferson City and Eldon [which demonstrated no new costs] presented

evidence at trial; St. Joseph and Buchanan County did not appear; no other political subdivision is a party." *Id* (emphasis added).

The plain teaching of *City of Jefferson I* and *City of Jefferson II* is that a successful claim under Article X, Sections 16 and 21, can only be brought by the political subdivision (in its own name or by an official on behalf of the political subdivision) and/or a taxpayer of that political subdivision. *See City of Jefferson II*, 916 S.W.2d at 796 (Article X, Sections 16 and 21, violation proven "[a]t trial [by] Jefferson City and its taxpayer") (emphasis added). If such a party proves its claim, the remedy is jurisdiction-specific, *i.e.*, only those political subdivisions that appear and prove an "unfunded mandate" are excused from compliance until sufficient funds are provided. The law survives. It is implemented everywhere other than in the prevailing political subdivision and, even in the prevailing subdivision, only the requirement of complying with the new "unfunded mandate" is suspended; the remainder of the law stays in effect. *See also Fort Zumwalt School District v. State*, 896 S.W.2d 918, 923 (Mo. banc 1995) ("declaratory judgment relieving a local government of the duty to perform . . . is an adequate remedy") (emphasis added).

In the present case, none of the Plaintiffs is a political subdivision, nor are any Plaintiffs suing in their official capacity on behalf of a political subdivision. In addition, as discussed subsequently in this brief, there was no evidence establishing any plaintiff as a taxpayer of any political subdivision with regard to which an "unfunded mandate" was

proved.[10] Even if a political subdivision had appeared (by itself, through one of its officials, or through one of its taxpayers) and proved such a violation, however, under *City of Jefferson II* the relief would have to have been limited only to that political subdivision and would have excused its compliance only with the "unfunded mandated." The Circuit Court could not have granted the remedy Plaintiffs sought, *i.e.*, statewide relief through a declaration of unconstitutionality and injunction against enforcement of the 2003 Amendments *in toto*, and could not even have granted relief to the complaining political subdivision as to the many other aspects of the 2003 Amendments having nothing to do with the claimed increase in the sheriff's duties. *See* New Sections 50.535 and 571.030 (set forth at App. at A25-A27).

Accordingly, the Plaintiffs' lack of standing and complete failure of proof aside, the Plaintiffs' Hancock Amendment claims could never have resulted in judgment declaring the 2003 Amendments void *ab initio* and *in toto*, nor could those claims have resulted in a statewide injunction against the 2003 Amendments taking effect. Thus, the Trial Court's refusal to grant such relief on these claims cannot have been error.

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[10] Plaintiffs' failure to establish such standing either in their "official capacities" or as taxpayers of any affected political subdivision is addressed in the next Point in this Brief.

Point IVb – Hancock Claim Not Justiciable

The Circuit Court did not err in refusing to declare the 2003 Amendments unconstitutional, or to enjoin their taking effect, under the "unfunded mandate" provisions of the Hancock Amendment (Article X, Sections 16 and 21) because such a claim is not presently justiciable in that it is based solely upon speculative future duties and expenses, and in that Plaintiffs lack standing to bring it.

(Responds to Point IV of Plaintiffs' "Cross Appeal")[11]

Plaintiffs' claim that the 2003 Amendments violate the prohibition against "unfunded mandates" in the Hancock Amendment (Article X, Sections 16 and 21) is not justiciable because such a claim is premature, at best, and because these Plaintiffs lack standing to pursue such a claim. Ripeness and standing are elements of justiciability, which is itself an element of subject matter jurisdiction, without which the Circuit Court properly refused to issue the injunction and declaration Plaintiffs sought. *See State ex rel.*

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[11] As noted in the Jurisdictional Statement of this Brief, *supra*, the Plaintiffs have not filed a timely Notice of Appeal in this matter. Hence, there is no "Cross Appeal," and Plaintiffs are not entitled to any appellate relief of any kind. Nevertheless, the State responds to the issues raised in Point IV of Plaintiffs' Brief only to the extent that this Court may wish to address those issues as having been offered by the Plaintiffs under Rule 84.04(f).

Nixon v. American Tobacco Co., 34 S.W.3d 122, 132 (Mo. banc 2000); *Akin v. Director of Revenue*, 934 S.W.2d 295, 298 (Mo. banc 1996).

Ripeness

The 2003 Amendments have never gone into effect. There was no evidence that any county or other political subdivision is presently required to undertake any new or expanded duties with respect to those amendments, and no proof that any county or other political subdivision has incurred a single penny of expense as a result of those amendments. All of the evidence submitted at trial was – and by necessity had to be – guesswork, assumption, and speculation. This is insufficient to overcome the strong presumption of constitutionality that attends every legislative enactment. *See Miller v. Director of Revenue*, 719 S.W.2d 787, 789 (Mo. banc 1986).

This Court has repeatedly held that a violation of Article X, Sections 16 and 21, can only be demonstrated by a specific factual showing of (1) new or increased duties, and (2) increased expenses. *Id.*, at 788-89. These elements cannot be established by "guesswork," "common sense," or "speculation." *Id.* "This Court will not presume increased costs resulting from increased mandated activity." *City of Jefferson I*, 863 S.W.2d at 848.

In *City of Jefferson II*, this Court specifically refused to find a violation of Article X, Sections 16 and 21, when the increased expenses were to be incurred (if at all) only in the future, and were speculative in their amount:

> [Plaintiffs'] creative arguments need not be resolved now. With no updated plan yet filed and approved, it is impossible to ascertain whether Jefferson City will actually have increased implementation costs or to what extent those costs will result from an unfunded mandate. Moreover, Jefferson City has no current obligation to implement or review a S.B. 530 solid waste plan. In the absence of an updated plan, the circuit court's ruling on these issues was premature, as would be a decision by this Court.

City of Jefferson II, 916 S.W.2d at 797 (emphasis added).

Here, Plaintiffs' "unfunded mandate" claims are based solely on their speculation that local law enforcement agencies will have to perform new or additional duties, and that these duties will result in increased expenses. Plaintiffs did not prove which, if any, law enforcement agencies will have to perform new or additional duties – only that some agencies may have to do so. Plaintiffs did not prove the amount of new expenses, let alone prove that the new expenses were the direct result of the 2003 Amendments rather than existing duties – only that some agencies may incur some additional expenses. This Court has never found a Hancock Amendment violation on such a complete absence of evidence – and should not do so now.

Standing

Article X, Section 23, is not an open invitation for a citizen in one part of this state to sue the State claiming a violation of the "unfunded mandate" provisions of Article X,

Sections 16 and 21, in some other part of the state. Even if Plaintiffs had been able to prove a Hancock Amendment violation – which they did not – they failed to prove a sufficient nexus between any individual Plaintiff and the political subdivision suffering under the supposed "unfunded mandate."[12] Accordingly, the Circuit Court properly denied Plaintiffs' Hancock Amendment Claims.

Even a cursory review of this Court's jurisprudence under Article X, Sections 16 and 21, demonstrates that some nexus between a plaintiff and the political subdivision supposedly suffering under the "unfunded mandate" is required. These cases show that claims or defenses based upon Article X, Sections 16 and 21, can only be raised by the political subdivision itself, or one of its taxpayers, or an official suing on behalf of that political subdivision. *See St. Charles County v. Director of Revenue*, 961 S.W.2d 44, 48 (Mo. banc 1998) ("local taxing authorities" raised Article X, Section 21, claim); *Division of Employment Security v. Taney County District R-III*, 922 S.W.2d 391, 395 (Mo. banc 1996) (school district raised Article X, Section 21, as a defense); *Jefferson II*, 916 S.W.2d at 796 ("Jefferson City and its taxpayer" proved Article X, Section 21, violation at trial); *Missouri Municipal League v. State*, 932 S.W.2d 400, 401 (Mo. banc 1996) (referred to

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[12] An organization, the Institute for Peace and Justice, was a plaintiff below. The Circuit Court dismissed it with prejudice for lack of standing. App. at A4. No arguments have been briefed on behalf of that plaintiff. Thus, its claims in whatever capacity are not before this Court.

herein as the "*MML*" case) (organization of city governments brings and succeeds on Article X, Section 21, claim)[13], *County of Jefferson v. QuikTrip Corporation*, 912 S.W.2d 487, 488 (Mo. banc 1995) (Article X, Section 21, claim brought by county and county officials); *Fort Zumwalt School District*, 896 S.W.2d at 919, 921 (holding that, although school district lacked standing, "taxpayers of these school districts" had standing to raise Article X, Section 21, claim) (emphasis added); *Rolla 31 School District v. State*, 837 S.W.2d 1, 2 (Mo. banc 1992) ("five school districts and four individual taxpayers of two of the school districts" proved a violation of Article X, Section 21) (emphasis added); *Harrison v. Monroe County*, 716 S.W.2d 263, 267 (Mo. banc 1986) (local taxpayer

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[13] The ability of a political subdivision to raise an "unfunded mandate" claim in its own name, or through an association under the *MML* case, has been called into question by *Missouri Association of Counties v. Wilson*, 3 S.W.3d 772, 776 (Mo. banc 1999) (referred to herein as the "*MAC*" case). But, in *MAC*, this Court did not address the holding of *MML* or any of the other cases which seem clearly to hold to the contrary. *See, e.g.*, *St. Charles County*, 961 S.W.2d at 48 ("local taxing authorities" raise Article X, Section 21, claim); *Division of Employment Security*, 922 S.W.2d at 395 (school district raised Article X, Section 21, as a defense). This uncertainty, however, has nothing to do with the present case, in that Plaintiffs do not claim to be acting on behalf of any county, and no county has sued for relief from the 2003 Amendments, either in its own name or through an association.

plaintiff had standing to raise Article X, Section 21, claim)[14]; *Boone County Court v. State*, 631 S.W.2d 321, 322 (Mo. banc 1982) (plaintiffs brought Article X, Section 21, claims "in their official capacity as duly elected judges of the Boone County Court, and in their individual capacities as taxpayers and citizens of Boone County); *State ex rel. Sayad v. Zych*, 642 S.W.2d 907, 901, 911 (Mo. banc 1982) (St. Louis City officials successfully raised Article X, Section 21, as a defense to writ to compel performance of unfunded mandate).

Here, no county or other political subdivision has sought relief. Nor do any of the Plaintiffs have standing to assert "official capacity" claims on behalf of any political subdivision. Several Plaintiffs attempted to assert "official standing" in this case, *see* Amended Petition at ¶¶ 4, 5, 8, 9, 10, 11, and 12 (L.F. at 44-45), but the only evidence offered was that Plaintiff Brooks is a Kansas City councilman and that Plaintiff Krewson is a St. Louis City alderman. And neither Plaintiff Brooks, nor Krewson, nor any other plaintiff is authorized to bring an "official capacity" suit in the name of any county. *See*

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[14] The *Harrison* opinion may have been "withdrawn" after remand, *see Missouri State Employees' Retirement System v. Jackson County*, 738 S.W.2d 118, 123 fn. 3 (Mo. banc 1987), but this opinion continues to be cited and quoted by this Court. *See, e.g., Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47, 53 (Mo. banc 1999); *School Distr. of Riverview Gardens v. St. Louis County*, 816 S.W.2d 219, 226 (Mo. banc 1991); *Phillips v. Missouri Dept. of Social Services*, 723 S.W.2d 2, 4 (Mo. banc 1987).

State ex rel. Mathewson v. Board of Election Commissioners, 841 S.W.2d 633, 635 (Mo. banc 1992) (holding that the President Pro Tem of the Senate had no standing to bring suit in his official capacity, as he had no "personal stake" in the outcome of the case); *State ex rel. Smith v. Grant*, 943 S.W.2d 319 (Mo. App. 1997) (alderman lacked standing). None of the Plaintiffs even purport to be acting on behalf of a county. In any event, the Circuit Court rejected all "official capacity" claims (L.F. at 378), and Plaintiffs have not appealed from that decision, nor any other aspect of the Circuit Court's judgment. *See* Jurisidictional Statement, *supra*.

Instead of a county or even county officials, Plaintiffs are a collection of individuals claiming "taxpayer status" to raise their Hancock Amendment claims. At trial, Plaintiffs' only evidence of a Hancock Amendment violation – albeit speculative and insufficient as noted elsewhere in this Brief – came from Jackson County, Greene County, Camden County, and Cape Girardeau County. Plaintiffs lack standing because they did not adduce any evidence that any Plaintiff was a taxpayer of any of these counties. At trial, the parties stipulated only that Ms. Krewson and Mr. Brooks were residents of the City of St. Louis and Jackson County, respectively, and that each "pays taxes to the State of Missouri." *See* Tr. Vol. II at 11 and 12. There was no other evidence regarding any other Plaintiff.

"Taxpayer standing" to raise an "unfunded mandate" claim cannot be based solely on a showing that a plaintiff pays State taxes because a plaintiff must be a taxpayer of the

affected political subdivision. This Court has explained that standing requires a plaintiff to demonstrate "not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result[.]" *Harrison*, 716 S.W.2d at 266 (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 448 (1923), and observing that "[t]he same requirement of justiciability exists under Missouri law"). Moreover, in *Harrison*, this Court directly addressed the standing necessary as a taxpayer to assert a violation of Article X, Sections 16 and 21:

> As for the "zone of interests" limitation, appellant satisfies this requirement also; he is a citizen of a local community who is being called upon to pay for, at a local level, what is at least arguably required to be paid for by the state under art. X, § 21. *See Boone County Court v. State*, 631 S.W.2d 321 (Mo. banc 1982).

Harrison, 716 S.W.2d at 267 (emphasis added).

The requirement that a plaintiff must establish that he or she is a taxpayer of the burdened political subdivision echos throughout this Court's Article X, Section 21, jurisprudence.[15] *See City of Jefferson II*, 916 S.W.2d at 796 ("Jefferson City and its

[15] Nothing in Article X, Section 23, is to the contrary. This Section provides: "Notwithstanding other provisions of this constitution or other law, any taxpayer of the state, county or other political subdivision shall have standing . . . to enforce the provisions of sections 16 through 22 . . . ." [Emphasis added.] In fact, if plaintiffs are not

taxpayer" proved Article X, Section 21, violation at trial) (emphasis added); *Fort Zumwalt School District*, 896 S.W.2d at 919 (holding that, although school district lacked standing, "taxpayers of these school districts" had standing to raise Article X, Section 21, claim) (emphasis added); *Rolla 31 School District*, 837 S.W.2d at 2 ("five school districts and four individual taxpayers of two of the school districts" proved a violation of Article X, Section 21) (emphasis added); *Boone County Court*, 631 S.W.2d at 322 (plaintiffs brought Article X, Section 21, claims "in their official capacity as duly elected judges of the Boone County Court, and in their individual capacities as taxpayers and citizens of Boone County) (emphasis added).

The reason for the requirement that plaintiffs demonstrate that they are taxpayers of the political subdivision supposedly burdened with the "unfunded mandate" is easily understood when this requirement is viewed in conjunction with the jurisdiction-specific nature of the remedy available under Article X, Section 16 and 21, as discussed previously in this Brief. Taxpayers of one political subdivision must seek to protect their own interests, without forcing their view of the applicable policy or facts on other

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required to demonstrate that they are taxpayers of the supposedly affected political subdivision to bring an "unfunded mandate" claim under Article X, Sections 16 and 21, the inclusion of the words "of the . . . county or other political subdivision" in Article X, Section 23, would be mere surplusage – a construction manifestly to be avoided. *See Buechner v. Bond*, 650 S.W.2d 611, 613 (Mo. banc 1983).

political subdivisions. Similarly, if certain political subdivisions in this state do not believe that the 2003 Amendments are an "unfunded mandate," or are willing to comply anyway, they are free to do so. *Cf. Rolla 31 School District*, 837 S.W.2d at 7 (school districts could not be compelled to comply with unfunded mandate for new early childhood special education programs, but Court did not even suggest that the plaintiff district, or any district, was prohibited from providing the service if it so chose).

But Plaintiffs ignore these simple principles. Instead, they seek to leverage state taxpayer status into a roving charter sufficient for them to control whether any political subdivision in this state should be allowed to comply with the 2003 Amendments. For instance, they claim that Greene County is burdened by a "unfunded mandate" and demand that Greene County be prohibited from implementing the 2003 Amendments. But Greene County itself seeks no such relief, and there was no evidence that any Plaintiff is a Greene Country taxpayer. The only evidence in the record is that the Sheriff of Greene County denies that the 2003 Amendments impose any "unfunded mandate." The same is true for Camden County and Cape Girardeau County. None of these counties – not even Jackson County – filed suit asking for relief. No claim is raised by anyone proven to be a taxpayer of any of these counties. Just the Plaintiffs, seeking to impose their view . . . statewide.

Accordingly, Plaintiffs failed to demonstrate the necessary standing as taxpayers of any affected political subdivision to assert their Hancock Amendment "unfunded

mandate" claim. This failure, combined with the premature and speculative nature of this claim, deprived the Circuit Court of jurisdiction to address those claims. Thus, the Circuit Court's refusal to grant relief on those claims cannot have been error.

Point IVc – Failure to Prove Hancock Claim

The Circuit Court did not err in refusing to declare the 2003 Amendments unconstitutional, or to enjoin their taking effect, under the "unfunded mandate" provisions of the Hancock Amendment (Article X, Sections 16 and 21) because Plaintiffs failed to prove that the 2003 Amendments imposed new or increased duties, or increased costs due to such duties, on local sheriffs in that the Circuit Court found that the duties required by the 2003 Amendments were insubstantial extensions of duties already performed by local sheriffs and that the total amount of fees generated by applications for concealed carry endorsements would exceed any new costs associated with any new or increased duties.

(Responds to Point IV of Plaintiffs' "Cross Appeal")[16]

As noted above, Plaintiffs lack standing to bring their Hancock Amendment claim, and that claim is based entirely on speculation regarding what might happen if and when the 2003 Amendments go into effect. Those reasons alone are sufficient to affirm the

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[16] As noted in the Jurisdictional Statement of this Brief, *supra*, the Plaintiffs have not filed a timely Notice of Appeal in this matter. Hence, there is no "Cross Appeal," and Plaintiffs are not entitled to any appellate relief of any kind. Nevertheless, the State responds to the issues raised in Point IV of Plaintiffs' Brief only to the extent that this Court may wish to address those issues as having been offered by the Plaintiffs under Rule 84.04(f).

Circuit Court's refusal to grant judgment in favor of the Plaintiffs on this claim. Even assuming that Plaintiffs were entitled to bring a purely speculative and prospective "unfunded mandate" claim – which they are not – the Circuit Court properly denied their claim because Plaintiffs' evidence fell far short of establishing the necessary elements.

To establish a violation of Article X, Sections 16 and 21, the Plaintiffs must make "a specific factual showing of both an increased level of activity required by the State, and increased costs in performing that activity." *Division of Employment Security*, 922 S.W.2d at 395. *See also Miller*, 719 S.W.2d at 789. Plaintiffs failed to establish either element.

New or Increased Duties

The Circuit Court found that Plaintiffs failed to prove that the 2003 Amendments required sheriffs to perform new or additional duties. L.F. at 379 ("[i]t is certainly questionable whether this law [does so]"). Such a finding may only be reviewed for error under the standard of *Murphy v. Carron*, 536 S.W.2d 30, 31 (Mo. banc 1976). *See City of Jefferson II*, 916 S.W.2d at 796 (applying *Murphy v. Carron* to circuit court findings on Hancock Amendment claims).

Plaintiffs' claim that the 2003 Amendment imposes on sheriffs new or additional duties rests entirely on the provisions of New Section 571.094 (set forth at App. at A27-A42). But the individual activities or services set forth in that Section are part of the normal operations in sheriffs' offices throughout the state, and thus are not properly

considered when assessing an "unfunded mandate" claim. *See County of Jefferson*, 912 S.W.2d at 492 (requirement of activities that are already "part of the normal operations of any county" cannot establish an Article X, Section 21 claim).

The only evidence on this issue introduced at trial came from Captain Moran of the Jackson Country Sheriff's Office, Sheriff Merritt of Greene County, Sheriff Page of Camden County, and Sheriff Jordan of Cape Girardeau County. Each of the four witnesses testified that he presently takes applications and processes payments for any number of different reasons having nothing to do with the concealed carry law. Tr. Vol. 2, pp. 31 (Moran); 95 (Merritt); 55 (Page); and 77 (Jordan).

All four witnesses testified that they take and transmit to the Missouri Highway Patrol fingerprints for any number of different reasons having nothing to do with the concealed carry law. Tr. Vol. 2, pp. 31 (Moran); 97-98 (Merritt: 30,00-40,000 sets per year); 57 (Page: 3,500 sets per year); and 78 (Jordan: 7,000-9,000 sets per year).

All four witnesses testified that they perform background checks on any number of individuals for any number of reasons having nothing to do with the concealed carry law. Tr. Vol. 2, pp. 31 (Moran); 95-96 (Merritt: over 30,000 per year); 56 (Page: 2,000-2,500 per year); and 80 (Jordan: over 5,000 per year).

And all four witnesses testified that they issue other types of permits, and revisit their issue on application for renewal or revocation. Tr. Vol. 2, pp. 31-32 (Moran); 95 (Merritt); 55 (Page); and 77 (Jordan). One such type of permit that the sheriffs'

departments issue, separate from the certificate of qualification for concealed carry under the New Section 571.094, is the permit to acquire a concealable weapon under §571.090. Tr. Vol. 2, pp. 3-32 (Moran: 5,000-6,000 per year); 95 (Merritt: 3,500-4,000 per year); 55-56 (Page: 500-600 per year); and 78 (Jordan: over 800 per year).

Accordingly, there was not only sufficient evidence to support the conclusion that the 2003 Amendments impose no requirement of "new activities or services" under Article X, Section 21, that evidence was uncontroverted.

Plaintiffs are thus left to argue only that 2003 Amendments require a substantial increase in the types of activities or services already being performed by the state's sheriffs. In this, Plaintiffs again failed completely. This Court has long acknowledged that the "unfunded mandate" provisions of the Missouri Constitution do not prohibit requirements that result in a *de minimus* increases in the activities or services already being provided. *See County of Jefferson*, 912 S.W.2d at 491; *Miller*, 719 S.W.2d at 789.

There was no evidence at trial that the 2003 Amendments would require an increase in activities and services already performed by sheriffs that is more than *de minimus*. This, again, results from the fact that the 2003 Amendments have not gone into effect and, at present, no one knows what increase – if any – in existing levels of activities and services will be required. Each of the four witnesses specifically acknowledged this central, inescapable fact. *See* Tr. Vol. 2, pp. 36 (Moran); 99 (Merritt); 59 (Page); and 83 (Jordan). Neither the assertions or assumptions of the Plaintiffs, nor

the speculations of any of the witnesses, is an adequate substitute for evidence of the new or additional activities or services actually being provided as a direct result[17] of the new State mandate. *See City of Jefferson II*, 916 S.W.2d at 797; *Miller*, 719 S.W.2d at 789. Accordingly, Plaintiffs failed to establish this element of their claim, and the Circuit Court's finding in this regard must be affirmed.

Increased Costs

As with the first element, the Circuit Court also found that Plaintiffs had failed to prove the second element of their "unfunded mandate" claim under Article X, Sections 16 and 21. L.F. at 379 ("There is no evidence to support the proposition that the law will result in increased costs to the Sheriffs' offices of the State.") (emphasis added). This finding must be affirmed under *Murphy v. Carron* unless there is no evidence in the record to support the finding, or the finding is against the weight of the evidence. *City of Jefferson II*, 916 S.W.2d at 796.

Each of the four witnesses at trial acknowledged that he did not know how many applications for concealed weapons endorsements would be received, and thus no witness could say what increase in activities or services would be required or the amount each

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[17] For instance, Captain Moran admitted that the two new deputies and three clerical staff whom he plans to hire to "implement" the 2003 Amendments will also perform duties associated with the normal operations of the department. Tr. Vol. 2, pp. 15, 33.

would be required to spend to perform these activities or services. *See* Tr. Vol. 2, pp. 36 (Moran); 99 (Merritt); 59 (Page); and 83 (Jordan). This, alone, is adequate to affirm the Circuit Court's finding under *Murphy*.

But Plaintiffs' failure of proof was more profound. The 2003 Amendments authorize each sheriff to charge up to $100 per initial application for a concealed weapons endorsement and up to $50 for each renewal application. Each of the four witnesses at trial acknowledged that the total amount of these fees would certainly exceed the total expenses incurred by their departments. *See* Tr. Vol. 2, pp. 36-37 (Moran); 103-105 (Merritt); 63 (Page); and 85 (Jordan). This evidence was uncontroverted. This Court has acknowledged that actual receipt of new funds to offset new expenses defeats an "unfunded mandate" claim under Article X, Sections 16 and 21. *City of Jefferson II*, 916 S.W.2d at 797. Thus, the admission of Plaintiffs' witnesses (and those offered by the State), *i.e.*, that their expenses in implementing the 2003 Amendments – whatever they may prove to be – would certainly be no more than the revenue that the 2003 Amendments provide, is by itself an adequate basis on which to affirm the Circuit Court.

To overcome the admissions of their own witnesses, Plaintiffs have concocted a theory by which the General Assembly purposefully prevented the applications fees for which it provided from being used to defray the expense of implementing the 2003 Amendments. This is absurd, and the Circuit Court properly rejected this argument.

Plaintiffs argue that New Section 50.535 (set forth at App. at A25) permits sheriffs to spend the application fees only for training and equipment relating to the 2003 Amendments, but not for any of the other types of expenses. But that is not what New Section 50.535 says. It provides that these fees "shall only be used by law enforcement agencies for the purchase of equipment and to provide training." [Emphasis added.]

The word "only" limits who may spend the application and renewal fees, not the categories of expenses for which these fees can be spent. The categories of "equipment" and "training" are illustrative, but there is no indication that the General Assembly intended them to be limitations, and this Court should not construe them that way.[18] *See Cape Motor Lodge v. City of Cape Girardeau*, 706 S.W.2d 208, 212 (Mo. banc 1985) ("provisions contain no indication that the express enumerations of the entities named are to be considered as the exclusion of others not named").

The context of the remainder of New Section 50.535 confirms that the General Assembly intended only to address who could spend this money, and not to limit the categories for which it could be spent. In New Section 50.535.1, the General Assembly provided that these funds were to "be expended at the direction of the county or city sheriff or his or her designee . . . ." *See* App. at A25. In New Section 50.535.2, the

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[18] Plaintiffs offer no support for their assertion that the training and equipment expenses need be related to the implementation of the 2003 Amendments; certainly the text of New 50.535 contains no such limitation.

General Assembly again addressed this point by providing that "[n]o prior approval of the expenditures from this fund shall be required by the governing body of the county or city[.]" *Id.* And, as if these provisions were not clear enough, the General Assembly went on to provide that, where a sheriff of a first class county designates a police chief within the county to administer concealed weapons endorsement applications, the sheriff "shall reimburse such chiefs of police, out of the moneys deposited into this fund, for <u>any reasonable expenses</u> related to accepting and processing such applications." [Emphasis added.] Thus, under Plaintiffs' construction of New Section 50.535, a sheriff can only defray his or her expenses relating to administering the 2003 Amendments within certain narrow categories, but must reimburse police chiefs for all of their expenses without regard to any categorical limitations. Such an absurd construction can and must be rejected.

In *City of Jefferson I*, this Court made clear that – wherever possible – it would construe a statute so as to avoid a violation of Article X, Sections 16 and 21. "[W]here a statute is susceptible to more than one construction, this Court's obligation is to construe the statute in a manner consistent with the constitution. We do so now[.]" *City of Jefferson I*, 863 S.W.2d at 848.

Such a construction is available in this case. The construction offered by the State, *i.e.*, that the sheriff – but only the sheriff – may spend the fees received, and that he or she may do so for any category of expense including – but not limited to – the categories

identified in New Section 50.535.2, is consistent with the language used by and the obvious intent of the General Assembly. This construction is also consistent with Article X, Sections 16 and 21, with which the General Assembly obviously (and presumably) intended to comply. The construction offered by the Plaintiffs not only does violence to the text of the statute and the intent of the General Assembly, it forces a conflict with the constitution where none is necessary. Plaintiffs' construction should be, and under *City of Jefferson I* must be, rejected.

In sum: The uncontroverted evidence in this case is that the endorsement application and renewal fees will equal or exceed the expenses incurred in implementing the 2003 Amendments. The language of New Section 50.535, when properly construed, contains no prohibitions on sheriffs using those funds to pay for these expenses. Thus, the Plaintiffs failed to establish the second required element of an "unfunded mandate" claim, and the Circuit Court's finding in this regard must be affirmed.

Point V – Denial of Motion to Amend to Raise New Hancock Claim

The Circuit Court did not err in refusing to declare the 2003 Amendments unconstitutional, or to enjoin their taking effect, under the Hancock Amendment (Article X, Section 22) because Plaintiffs' Second Amended Petition raised no such claim, nor was such claim tried by consent, in that Plaintiffs twice sought leave after trial to amend their Petition to add these new claims and the Trial Court twice properly denied Plaintiffs leave to amend.

(Responds to Points V and VIII of Plaintiffs' "Cross Appeal")

As noted in the Jurisdictional Statement of this Brief, *supra*, Plaintiffs failed to file a timely Notice of Appeal from the Circuit Court's judgment in this case. Whatever ability Plaintiffs may have to continue to assert their claims under Article X, Section 16 and 21, as Respondents to the State's appeal, *see* Rule 84.04(f), they are not entitled to assert any claim of error on their own or to seek any appellate relief from this Court at all. Accordingly, the Circuit Court's refusal (twice) to allow the Plaintiffs to assert new claims under Article X, Section 22, after trial in this matter is not before this Court. Even if this Court could review this decision, however, it should surely be affirmed. A trial court's denial of a motion to amend will not be disturbed on appeal "absent an obvious and palpable abuse of discretion," *Kenley v. J.E. Jones Construction Co.*, 870 S.W.2d 494, 498 (Mo. App. 1994), and no such abuse has been shown.

Plaintiffs argue that the Circuit Court erred in not granting their post-trial motions to amend their Petition under Rule 55.33 to conform to the evidence presented at trial. Plaintiffs' last-gasp attempts to find a viable legal theory, however, ignore the plain language of Rule 55.33(b), which speaks only to circumstances in which "issues not raised by the pleadings are tried by express or implied consent of the parties[.]" Thus, for this Rule to apply, the proposed amendment must be based on evidence that has been admitted without objection, and that evidence must "bear only on the new issue, and not be relevant to an issue already in the case." *Jefferson v. Bick,* 872 S.W.2d 115, 120 (Mo. App. 1994) (emphasis added). Obviously, the sheriffs' testimony to which Plaintiffs point was germane to Plaintiffs' "unfunded mandate" claims under Article X, Sections 16 and 21. Plaintiffs do not suggest otherwise. Thus, notwithstanding that this testimony may have awoken in Plaintiffs some new, unpled legal theory, the Article X, Section 22, theory they now seek to raise was not "tried by express or implied consent" of the State. *See Gardner v. City of Cape Girardeau*, 880 S.W.2d 652, 656 (Mo. App. 1994) (Rule 55.33(b) does not permit plaintiffs to raise new legal theories, just new factual issues). The Circuit Court's refusal to permit the amendment, therefore, was not error.

In addition, the most obvious and compelling reason for this Court to deny – just as the Circuit Court did – Plaintiffs' last-gasp attempt to insert new legal theories is that Plaintiffs' claims under Article X, Section 22, are simply baseless on their face. "Futility," *i.e.*, that the late-arising theory is utterly groundless, is often the best and most

obvious basis for denying a motion for leave to amend. *Asmus v. Capital Region Family Practice*, 115 S.W.3d 427 (Mo. App. 2003).

Here, Plaintiffs seek leave to assert a violation of Article X, Section 22. That Section provides that "Counties and other political subdivision are hereby prohibited from levying any [new] tax, license or fees, . . . without the approval of the required majority of the qualified voters in each country or political subdivision voting thereon." By its plain terms, Article X, Section 22 speaks to what "counties and other political subdivisions" may do and not do. Here, the State and the Attorney General are the defendants, and the actions of the General Assembly in passing the 2003 Amendments are at issue. No "county or other political subdivision" is a defendant.[19] The evidence from the Sheriffs of Greene, Camden, and Cape Girardeau Counties that so offends the Plaintiffs profits them nothing because – even if the evidence established a violation of Article X, Section 22, which it did not – none of those counties is a defendant and an Article X, Section 22 claim cannot lie against the State.

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[19] Even if this Court considers Sheriff Murphy to be a party to this action – notwithstanding that he was added only as a pretext in order to defeat the State's motion to transfer – Plaintiffs claim no violation of Article X, Section 22 by Sheriff Murphy or the City of St. Louis. Plaintiffs ignored "Defendant" Murphy throughout the proceedings, did not call him at trial, and thus had no evidence of what he might or might not do in implementing the 2003 Amendments.

Another, equally obvious basis for rejecting Plaintiffs' after-the-last-minute attempt to assert an Article X, Section 22, claim is that such a claim requires a showing that the "county or other political subdivision" has levied a new tax, license or fee. Plaintiffs have not made this showing because they cannot make it. The fees at issue here, the concealed weapons endorsement application and renewal fees, are imposed by the State. *See* New Sections 571.094.10 and .11 ("the sheriff...shall charge a...fee..."), App. at A31. Therefore, whatever other provisions of the Hancock Amendment may apply, it does not fall under the provisions of Article X, Section 22.

In addition to the foregoing reasons, however, Plaintiffs' ill-fated Article X, Section 22, claim fails for all the same reasons that their other Hancock Amendment claim fails. They do not have standing; the claims are premature; and the remedy – even if they were entitled to one – cannot be the declaration that the 2003 Amendments are void *in toto* and *ab initio*, or the statewide injunction that they seek. If the future actions of one of the Sheriffs who testified at trial, or any of the other sheriffs and county officials who may be involved in implementing the 2003 Amendments, actually do violate the Missouri Constitution, that claim can be raised at a proper time, by a proper plaintiff, and result in a proper remedy. This is not that case.

This Court should not reach the issue of whether Plaintiffs should have been allowed to amend their pleadings after trial and after judgment to raise this issue because Plaintiffs failed to file a timely Notice of Appeal. Even if this Court does reach this issue,

however, it should affirm the decision of the Circuit Court in refusing to permit Plaintiffs' last-minute grasping at legal straws because Plaintiffs have not demonstrated that this ruling was an "obvious and palpable abuse discretion." *Kenley*, 870 S.W.2d at 494.

Point VI – Vagueness

The Circuit Court did not err in refusing to declare the 2003 Amendments unconstitutional, or to enjoin their taking effect statewide, under the "void for vagueness" doctrine because such a claim is not justiciable and lacks merit in that Plaintiffs lack standing to raise this claim and the 2003 Amendments provide adequate notice of the conduct being regulated.

(Responds to Point VI of Plaintiffs' "Cross Appeal")[20]

"Void for vagueness" leads off Plaintiffs' collection of makeweight arguments, that are rightly relegated to the back of their brief. Putting more effort into denying this

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[20] As noted in the Jurisdictional Statement of this Brief, supra, the Plaintiffs have not filed a timely Notice of Appeal in this matter. Hence, there is no "Cross Appeal," and Plaintiffs are not entitled to any appellate relief of any kind. Moreover, their Point Relied On VI (Plaintiffs' Brief at 101) fails to cite any the particular provision of the Missouri Constitution that Plaintiffs believe has been violated, and thus presents nothing for this Court to consider. *See J.A.D. v. FJ.D. III*, 978 S.W.2d 336, 339 (Mo. banc 1998) ("appellant must specifically identify the constitutional provision claimed to have been violated, such as by explicit reference to the article and section or by quotation of the provision itself"). Nevertheless, the State responds to the issues raised in Point VI of Plaintiffs' Brief only to the extent that this Court may wish to address those issues as having been properly offered by the Plaintiffs under Rule 84.04(f).

claim than Plaintiffs apparently did in raising it, the Circuit Court cited the applicable legal standards and held: "The law is what it is and this Court does not find it to be void due to vagueness." L.F. at 381. Plaintiffs lack standing to litigate the claim, and the claim is wholly without merit. On these grounds, the Circuit Court's decision must be affirmed.

With regard to standing, the "party who invokes the [judicial] power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement[.]" *Harrison*, 716 S.W.2d at 266 (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 448 (1923), and observing that "[t]he same requirement of justiciability exists under Missouri law"). Plaintiffs have failed to make such a showing.

Plaintiffs have not alleged or proven that they intend to seek a concealed weapons endorsement or that they intend to carry concealed weapons either with or without such an endorsement. Nor is there any reason to believe that they will or even might engage in such conduct.[21] Thus, even if the 2003 Amendments were vague – and they are not – the

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[21] Plaintiffs can have no standing to challenge an exemption to a prohibition on carrying a concealed weapon given that they are not members of the exempted class. "[An] [a]ppellant is not entitled to challenge for vagueness a provision of the statute which constitutes only an exception to those persons subject to the penal provisions when appellant does not contend he is or should be included in the class to which the exception

lack of notice would not affect Plaintiffs' ability to conform their conduct to the law or subject them to arbitrary enforcement of those laws.[22] Accordingly, Plaintiffs failed to establish the standing that this Court has repeatedly required:

> It is true that not just anyone has standing to attack the constitutionality of a statute. Only those adversely affected by the statute in question have the requisite standing. . . . [Requiring a sufficiently ripe controversy,] plus the purpose of preventing parties from creating controversies in matters in which they are not involved and which do not directly affect them are the principal reasons for the rule which requires standing.

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applies." *State v. Van Horne,* 622 S.W.2d 956, 959 (Mo. 1981) (prison inmate may not claim traveler's exemption to be vague).

[22] Every case cited by Plaintiffs illustrates the importance of standing, which Plaintiffs so conspicuously lack. *See* Plaintiffs' Brief at 101-03 (*citing City of Chicago v. Morales*, 527 U.S. 41 (1999) (ordinance challenged by those charged with violating it); *State v. Lee Mechanical Contractors*, 938 S.W.2d 269 (Mo. banc 1997) (statute challenged by defendant charged with violating it); *State v. Shaw*, 847 S.W.2d 768 (Mo. banc 1993) (same); *State v. Young*, 695 S.W.2d 882 (Mo. banc 1985) (same); *State v. Bratina*, 73 S.W.3d 625 (Mo. banc 2002) (same); *State v. Barnes*, 942 S.W.2d 362 (Mo. banc 1997) (same).

Ryder v. St. Charles County, 552 S.W.2d 705, 708 (Mo. banc 1977) (emphasis added). *See also State v. Van Horne,* 622 S.W.2d 956, 959 (Mo. 1981) (appellant lacks standing to challenge vagueness of the "travelers exception" to concealed weapons law "when appellant does not contend he is or should be in the class to which the exception applies."); *State ex rel. City of Springfield v. Public Service Commission*, 812 S.W.2d 827, 833 (Mo. App. 1991) (Appellants lacked standing because they "do not represent that any of the 'vague' provisions have been or are threatened to be enforced against them to their detriment"), *overruled on other grounds by MML*, 932 S.W.2d at 402.

Even if Plaintiffs had standing, their "void for vagueness" claim must still fail. "The test in enforcing the ["void for vagueness"] doctrine is whether the language conveys to a person of ordinary intelligence a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *Cocktail Fortune v. Supervisor of Liquor Control*, 994 S.W.2d 955, 957 (Mo. banc 1999). Plaintiffs make no attempt to meet this test. Instead, Plaintiffs spin a random series of hypotheticals – including scenarios involving a restaurant owner's cousin, a bar owner's brother-in-law, and the president of a church consistory (Plaintiffs' Brief at 106) – in which they claim some uncertainty could arise.[23] Plaintiffs go on to claim that an

[23] Some of that supposed uncertainty surely arises out of Plaintiffs' failure to acknowledge what the law actually says. *See* New Section 571.094.21 (App. at A36) ("[C]arrying of a concealed firearm in a location specified in subdivisions (1) to (17) of

ordinary person does not know what a "restaurant" is. *See* Plaintiffs' Brief at 108. And Plaintiffs devote much effort – without any explanation of how it could be relevant – to arguing that complying with the 2003 Amendments, or not complying them, may give rise to private tort liability, (*see* Plaintiffs' Brief at 107).

In short, Plaintiffs' claim seems to be that they could have done a better job of drafting the 2003 Amendments than their elected representatives. That may be so, but it does not make the 2003 Amendments unconstitutional. The mere fact that a statute may have to be interpreted and applied on a case-by-case basis does not render the statute unconstitutionally vague. *State ex rel. Cook v. Saynes*, 713 S.W.2d 258, 261 (Mo. banc 1986). "Neither absolute certainty nor impossible standards of specificity are required" for a statute to withstand scrutiny. *State v. Ellis*, 853 S.W.2d 440, 447 (Mo. App. 1993), *citing State v. Duggar*, 806 S.W.2d 407, 408 (Mo. banc 1991).

More fundamentally, "it is not necessary to determine if a situation could be *imagined* in which the language used might be vague or confusing; the language is to be treated by applying it to the facts at hand." *Lee Mechanical Contractors*, 938 S.W.2d at 271 (*quoting State v. Young*, 695 S.W.2d 882, 883-84 (Mo. banc 1985) (emphasis added)). Plaintiffs in this case present no facts, only hypothetical questions concerning

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subsection 20 of this section by a person who holds a concealed carry endorsement issued pursuant to this section shall not be a criminal act but may subject the person to denial of the premises or removal from the premises[.]").

situations that will never involve them. In such a case, the statute must be upheld unless it "proscribes no comprehensible course of conduct and cannot be applied to any set of facts. *Id.* (citing *State v. Hatton*, 918 S.W.2d 790, 792-93 (Mo. banc 1996)) (emphasis added). Plaintiffs rambling recitation of "what ifs" falls far short of this exacting standard. Accordingly, their "void for vagueness" claim must fail and Circuit Court's judgment rejecting that claim must be affirmed.

Point VII – Article I, Section I

The Circuit Court did not err in refusing to declare the 2003 Amendments unconstitutional, or to enjoin their taking effect statewide, under Article I, Section 1, because the 2003 Amendments were a proper exercise of the political power in that the General Assembly that enacted the 2003 Amendments was duly elected by the people of the State and thus the political power for the enactment of the 2003 Amendments it was in fact derived from the people, and the General Assembly properly exercised it.

(Responds to Point VII of Plaintiffs' "Cross Appeal")[24]

Plaintiffs argue that the new law violates Article I, Section 1 – which states that all political power is vested in and derived from the people – in that the new statute is contrary "to the will of the voters" as expressed in an unsuccessful 1999 referendum. Plaintiffs' Brief at 111. The trial court properly rejected that argument. Indeed, were it adopted, it would thwart the democratic principles that Plaintiffs purport to protect.

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[24] As noted in the Jurisdictional Statement of this Brief, *supra*, the Plaintiffs have not filed a timely Notice of Appeal in this matter. Hence, there is no "Cross Appeal," and Plaintiffs are not entitled to any appellate relief of any kind. Nevertheless, the State responds to the issues raised in Point VII of Plaintiffs' Brief only to the extent that this Court may wish to address those issues as having been offered by the Plaintiffs under Rule 84.04(f).

The General Assembly, whose members are elected by the people of their legislative districts to enact laws for the State of Missouri, voted to implement the 2003 Amendments after considerable debate and an historic override of the governor's veto. The body was authorized to do so: "[U]nless restrained by the constitution, [the General Assembly] is vested in its representative capacity with all the primary power of the people." *Three Rivers Junior College District of Poplar Bluff v. Statler*, 421 S.W.2d 235, 238 (Mo. banc 1967). Should the voters disagree with their elected representatives, the Missouri Constitution provides a mechanism to clearly articulate their position. *See* Article III, Section 49 (reservation to the people to enact and reject laws by initiative and referendum), and Article III, Section 52(a) (procedure for referring matters by general assembly or by petition; deadline for filing petitions).

It is not for the plaintiffs, by lawsuit, to avoid current expressions of the popular will based on earlier expressions related to the same general subject matter. The Constitution provides no mechanism for the courts to remake the policy choices that the General Assembly has made; to the contrary, the Constitution forbids the encroachment of one branch upon another. *See* Article II, Section 1 (separation of powers).

Citing no apposite constitutional provision that forecloses the General Assembly's authority to act after a referendum has been rejected, Plaintiffs argue that the General Assembly must forever accept a "no" vote by citing *State ex rel. Drain v. Becker,* 240 S.W. 229, 231 (Mo. banc 1922). Plaintiffs' Brief at 111. What the Court in *Drain* held

was that the General Assembly had no authority to "leap frog" the referendum process. The Court struck an act that the General Assembly passed – while certain referendum petitions here awaiting a vote – for the very purpose of mooting the referendum petitions. *Id.* at 230. The Court held that the General Assembly could certainly "amend or repeal any act, whether it had its origin in the General Assembly or in direct legislation; provided that the General Assembly exercises its right to do so upon enacted – not pending – measures." *Id.* at 232. Logically, that authority extends to acting upon measures that were rejected at the polls, as the General Assembly did here.

Plaintiffs also argue that the 2003 Amendments must be void because they violate public policy, as expressed by the 1999 vote. Plaintiffs' Brief at 112 (*citing Rutledge v. First Presbyterian Church of Stockton,* 212 S.W. 859, 860 (Mo. banc 1919)). But, for purposes of testing a law's validity by its conformity with public policy, the public policy is that which is found in the constitution and the laws of the state. *Rutledge,* 212 S.W. at 860-861. A "public policy statement of the people," which plaintiffs would divine by the 1999 defeat of the referendum, Respondent's Brief, p. 112, simply does not qualify as such under *Rutledge.*

Moreover, plaintiffs' pronouncement of public policy is simply unsupported. When the concealed carry legislation was submitted to voter in April 1999:

> 634,809 voters agreed that the legislation should be enacted, and
>
> 678,652 voters rejected the proposed legislation.

See Official Manual of the State of Missouri, 1999-2000, p. 619.

That was five years ago. Obviously, the electorate in the state of Missouri, and elsewhere, changes. The number of registered voters in Missouri in 1998, immediately prior to the referendum result that Plaintiffs claim is sacrosanct, was 3,635,991. *See* Official Manual, State of Missouri, 1999-2000, p. 555. But there were 3,681,844 registered voters in 2002, when the General Assembly that enacted the 2003 Amendments was elected. *See* **http://www.sos.mo.gov/elections/registeredvoters.asp**. The increase in the number of registered voters far exceeds the margin of defeat for the 1999 ballot measure.

More importantly, the electorate changes its views on many public issues. Certainly, it would be a bizarre form of democracy if any legislative body, either a representative one or the body of the whole, could only decide an issue one time and then never again be able to reconsider it. Most students of the legislative process are well aware that it can take more than one legislative cycle to build support for a controversial new idea. If accepted, Plaintiffs' argument – that a legislative body is forever bound by the legislative decisions of a prior legislative body – would inevitably lead to tyranny, a tyranny of the past. Indeed, if Plaintiffs' current challenge under Article I, Section 23 fails, by Plaintiffs' instant logic, no legislative body could later repeal the 2003 Amendments. That is folly. The public – and its elected representatives – have the right to change their minds. Our constitution does not deny that right. The enactment of the

2003 Amendments is, under our system of government, irrefutable evidence that the position of Missourians has changed since the 1999 referendum.

Because the General Assembly that enacted the 2003 Amendments was duly elected by the people of the State, the political power for the enactment of those amendments was in fact derived from the people. Accordingly, Plaintiffs' Article I, Section 1, argument must fail.

Conclusion

This Court should dissolve the permanent injunction entered by the court below, reverse that court's judgment, enter judgment upholding the constitutionality of House Bills 349, 120, 136, and 328, and order that the 2003 Amendments should go into effect immediately. This Court should also hold that the lower court erred in denying the motion to transfer to the only court of proper jurisdiction, the Circuit Court of Cole County, Missouri. Finally, this Court should vacate the assessment of costs against the State and Attorney General.

Respectfully submitted,

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

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