IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

ST. LOUIS COUNTY, MISSOURI, and CHARLIE A. DOOLEY, individually and in his capacity as County Executive of St. Louis County, Missouri, Plaintiffs, v. STATE OF MISSOURI, Defendant.	Cause No. 04CV32913 Division No. I

SUGGESTIONS OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

COME NOW Plaintiffs St. Louis County, Missouri and Charlie A. Dooley, and in opposition to Defendant's Motion for Summary Judgment, offer the following suggestions:

With Plaintiffs and Defendant agreeing upon a set of stipulated facts, and with the Court able to take judicial notice of the text of the relevant statutes and constitutional provisions, there are no disputes as to the facts associated with either Plaintiffs' or the State's motions for summary judgment. The dispute is with the legal conclusions that can be drawn from the facts. In the following portion of this memorandum, Plaintiffs demonstrate that the facts and law do not allow a conclusion that the State is entitled to judgment in its favor.

Both St. Louis County and Charlie A. Dooley in his official capacity as County Executive possess standing to challenge the concealed carry law as it relates to costs incurred by the County resulting from the law.

The State does not challenge the standing of Plaintiff Charlie A. Dooley in his personal capacity as a taxpayer of St. Louis County and the State of Missouri, while contesting the standing of Plaintiffs St. Louis County and Charlie A. Dooley in his capacity as County Executive. The State cites Missouri Association of Counties v. Wilson, 3 S.W.3d 772 (Mo. banc 1999) as authority for the proposition that only a taxpayer may assert a Hancock Amendment-based challenge to a legislative enactment. St. Louis County and County Executive Dooley are aware of the Wilson line of cases. However, the Wilson line of cases is not controlling of the case at hand. In fact, the two cases most heavily relied upon by the Supreme Court to reach its decision in Brooks v. State, 126 S.W.3d 844 (Mo. banc 2004), did not question the standing of local governments to pursue a Hancock claim of an unfunded mandate. See City of Jefferson v. Missouri Department of Natural Resources, 863 S.W.2d 844 (Mo. banc 1993) (City of Jefferson I) and City of Jefferson v. Missouri Department of Natural Resources, 916 S.W.2d 794 (Mo. banc 1996) (City of Jefferson II). It does not appear that the standing of the local governments was challenged by the defendants, but because a court may *sua sponte* raise the issue of standing in order to determine its own jurisdiction, Aufenkamp v. Grabill, 112 S.W.3d 455 (Mo. App. 2003), it must be concluded that the City of Jefferson courts were unconcerned about the standing of the local governments. Contrary to the State's urging, it cannot be said that local governments are unable to stand and challenge a Hancock unfunded mandate.

Second, the Court should not overlook the plain invitation of the Brooks court to counties to seek their own individualized relief against an unfunded mandate. Citing City of Jefferson II, id., the Brooks court noted that "proof of increased costs must be shown by each city or county affected by an unfunded mandate ..." Brooks, id. at 849. This suggests that the Supreme Court expects local governments to challenge unfunded mandates under the Hancock Amendment. By

filing this lawsuit, St. Louis County and the County Executive do no more than accept the Supreme Court's invitation. This Court should hold that the County and the County Executive have standing to pursue their claim that the County, in addition to individual taxpayers, suffer adversely from the unconstitutional unfunded mandate imposed by the concealed carry law.

This case does not lack ripeness simply because the State has not sought or threatened to compel the County to implement the concealed carry application process.

In arguing for summary judgment in its favor, the State says that Plaintiffs' claims are not ripe, basing its argument on two fallacious assertions. The first is that that the State has never tried to compel the County to comply with the concealed carry application process. But threats from the State to enforce the provisions of a statute are not necessary predicates of a ripe declaratory judgment action. In Homebuilders Association of Greater St. Louis, Inc. v. City of Wildwood, 32 S.W.3d 612 (Mo. App. 2000), the City of Wildwood moved to dismiss a declaratory judgment action that challenged certain city requirements concerning maintenance bonds. Just as the State does in this case, Wildwood argued the claim was not ripe, as there had been no attempt by it to enforce the bond requirements. Id. at 614. Rejecting Wildwood's argument, the court held that "Importantly, an injury need not have occurred prior to bringing a declaratory judgment action because one of the main purposes of declaratory relief is to resolve conflicts in legal rights before a loss occurs." Id. at 615. Accordingly, Plaintiffs' action does not lack ripeness simply because the State has not taken steps to compel the County to comply with the challenged provisions of the concealed carry law.

Moreover, the obligation to follow a validly enacted law does not begin at the point that an entity with enforcement authority moves to compel compliance. The County cannot presume that the State intended the County to begin processing concealed carry endorsement applications

only upon the State issuing a threat commanding compliance. To the contrary, when the General Assembly has overridden a gubernatorial veto to enact a statute, the County must presume that the State intended the law to apply upon its effective date. A present, ripe controversy between the parties exists: if the application and funding provisions of the concealed carry law are valid with regard to the County, then the County is under a legal obligation to comply with them, regardless of pressure from the Attorney General. However, if the County is to abide by the law, it must know what the law controlling its actions is. Brooks raised considerable doubt about the lawfulness of the statutory funding mechanism for the concealed carry law application process as it pertains to all counties, including St. Louis County. It is precisely for this reason that Plaintiffs' declaratory judgment action is unquestionably ripe.

Further supporting the argument that this case is ripe for decision, the County notes that compliance with the statutory provisions regarding processing endorsement applications would subject the County to the risk of a Hancock challenge by a taxpayer objecting to the imposition of an unfunded mandate upon the County (and thus its taxpayers).[1] Such a lawsuit would further expose the County to the risk of attorneys fees being assessed. Yet the alternative – simply disregarding State statute – would be inappropriate for a political subdivision of the State (and would subject the County to a risk of a mandamus action). A declaration of the rights of Plaintiffs is entirely called for, and can be no more ripe.

> *Plaintiffs are under no obligation to prove that the delegation option available to first class counties under Sections 50.535.3 and 571.101.12 eliminates the unreimburseable expenses associated with the concealed carry law, because St. Louis County is not a first class county.*

[1] Plaintiffs urge the Court to take judicial notice of such lawsuit pending against Moniteau County. See Barry v. State of Missouri, Cause No. CV704-29CC (Circuit Court of Moniteau County).

The State further argues, in support of its lack-of-ripeness argument, that the County has not pled whether it has designated a local police chief within the County to process the applications. As the Supreme Court noted in Brooks, id. at 850, "sheriffs of first-class counties have the option to 'designate one or more chiefs of police of any town, city or municipality within such county to accept and process [concealed-carry permit applications and then] reimburse such chiefs of police, out of the moneys deposited into the [sheriffs revolving fund] for any reasonable expenses related to accepting and processing such applications.'" It was observed that "In theory, this provision allows some sheriffs to defer most, if not all, of their increased activities and costs under the Act." Id. This is because Sec. 50.535 R.S.Mo., provides that Sheriff's Revolving Fund moneys may "only be used by law enforcement agencies for the purchase of equipment and to provide training" (Sec. 50.535.2), but that when the sheriff of a county of the first classification designates a local police chief to accept and process applications, such local police chief may be reimbursed from the Fund (Sec. 50.535.3). Accordingly, the State argues, designation by the County's Superintendent of Police of a local police chief to process applications would relieve St. Louis County of the unjustified and unconstitutional expense.

The flaw in the State's theory is that St. Louis County is not a first class county; rather, it is a charter county that exists outside of the classification system, and the County officer authorized to accept concealed carry applications lacks the statutory authority to make the designation. Under the Missouri Constitution, Article VI, Section 18(a), counties that originally were first class counties but which have adopted a charter are a separate class of counties outside of the classification system established under section 8 of Article VI. See Berry v. State, 908 S.W.2d 682, 684 (Mo. banc 1995) ("the 1995 constitutional amendment specifically creates a

separate class of charter counties 'outside of the classification system established under section 8 of this article [VI].'" See *Stipulation of Facts No. 3*. The distinction among the different kinds of counties is not to be ignored as meaningless, and a court may construe that the distinction is not intended by the General Assembly only to avoid absurd results. See also Leiser v. City of Wildwood, 59 S.W.3d 597 (Mo. App. 2001), where the court found the words "of the first classification" in Sec. 72.424 were "improvidently included." No absurd result would follow if the language of Sec. 50.535.3 were construed literally, there being fourteen counties of the first classification in this state to which the statute applies as drafted. That St. Louis County is not one of the fourteen does not mean the General Assembly intended charter counties to be among those that may designate local police chiefs to receive reimbursement from the Fund for processing concealed carry applications. Nor is there anything in the language of Brooks to indicate the Supreme Court's view that charter counties, in addition to first-class counties, possess the Sec.50.535 ability to use the Sheriff's Revolving Fund to reimburse local police chiefs for processing costs. St. Louis County is simply not authorized by Section 50.535 to designate a local police chief to process applications.

Further, the State's argument in this regard leads to an untenable situation: if a first class county chooses to ensure responsible and efficient application processing by processing the applications itself, with its own employees under its own supervision, then (according to the State) the first class county loses its ability to challenge the unfunded mandate. But designating a smaller and possibly less efficient local police department to process applications may cost applicants considerably more money than they would pay if the task were handled by a larger department that is better equipped to process a large number of applications. This Court should not make a ruling in a Hancock Amendment case that will in all likelihood cause citizens to dig

deeper into their pockets for a governmental service than is necessary.

Plaintiffs have not failed to name necessary and indispensable parties.

The State contends that this Court lacks jurisdiction because Plaintiffs have failed to join necessary and indispensable parties. The two are not the same. As observed in Edmunds v. Sigma Chapter of Alpha Kappa, 87 S.W.3d 21, 27 (Mo. App. 2002), "There is a subtle difference between the concept of a necessary party and an indispensable party... The absence of a necessary party is not fatal to jurisdiction. The remedy for failure to join a necessary party is by motion to add a necessary party rather than by motion to dismiss (citations omitted)." The State is wrong, then, in its belief that it is *Plaintiffs* who fail in not joining the officials claimed to be necessary and absent. If the State truly believes they are necessary, any defect can be cured by filing the appropriate motion. But the State is not entitled to summary judgment, even if the officials are necessary parties.

It is true that failure to join *indispensable* parties creates a jurisdictional defect. "An indispensable party is a necessary party who cannot feasibly be joined at the time, but whose absence is so critical that equity and good conscience will not permit the matter to proceed without that party." Id. But this is not the case at all. The officials claimed by the State to be missing from this case cannot be termed "indispensable" because there is no reason to believe they cannot feasibly be joined, should the State so move. Second, the officials can be thought indispensable only if they are necessary, that is, if in their absence, their ability to protect their interests would be, as a practical matter, impaired or impeded. Id. Yet these officials have no interest to protect with regard to this Hancock challenge. Certainly the State has pointed to none, expressing no desire to be involved in the matter. The unfunded mandate at issue is the burden of the County and its taxpayers, and not of the officials, who only spend the County's and

taxpayers' money in accordance with the mandate. Whether the State should fund the mandate, or whether the Hancock Amendment permits the County to expend its funds to carry out the mandate, is not of interest to the officials said to be indispensable. Because there are no entities not in the case whose rights as to funding the mandate will not be protected by the parties in the case, there are no missing necessary or indispensable parties.

That Plaintiffs have not sought an injunction, rather than seeking declaratory judgment, does not merit summary judgment for the State.

The State errs in asserting that an injunction is the only relief available to a person challenging a statute under the Hancock Amendment. Perhaps its assertion is based on the language of the Supreme Court in Brooks. In finding that the concealed carry law constitutes an unfunded mandate in Jackson, Cape Girardeau, Greene and Camden Counties, the court held that an injunction lay prohibiting enforcement by the State. Brooks, id. at 850. But that is because the plaintiffs in that case chose to seek an injunction. The court did not hold that only an injunction would lie. In fact, declaratory judgment has specifically been found as an option available to a challenger of a law under Hancock.

In Fort Zumwalt School District v. State, 896 S.W.2d 918 (Mo. banc 1998), the court considered whether a suit seeking attorneys' fees and costs as a remedy to enforce Hancock could stand, as essential to enforcing the rights in question. The court said that permitting a money judgment against the State was not essential, because there are other, less onerous remedies available. "Specifically, a declaratory judgment relieving a local government of the duty to perform an inadequately funded required service or activity is an adequate remedy." Id. at 923. In making this statement, the Supreme Court explicitly recognized the availability of declaratory judgment as an option to challenge an unfunded mandate, in addition to the option of

seeking an injunction. There is no reason, therefore, to suppose that an injunction is the *only* remedy available, nor is there case law in support of such an assertion.

In fact, an injunction against the State in this instance would not be particularly helpful. The State has said it does not intend to compel the County to process applications, and at that the State may be taken at its word. Plaintiffs, then, are not concerned about a suit filed against it by the State. As noted above, though, what concerns Plaintiffs is the palpable threat of suit by persons seeking to file their applications, or by persons seeking to prevent use of County funds to pay for the processing. The moment the concealed carry law became effective the threat of both arose, and continues through this day. Plaintiffs are within their rights to seek a declaration, and are not obliged to seek an injunction which would be useless as a shield against any of the two possible kinds of attack.

For all of the reasons stated herein, the State should not be granted summary judgment.

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A copy of the foregoing was faxed this 10th day of September, 2004 to Jeremiah W. (Jay) Nixon, Attorney General, and to Paul C. Wilson, Deputy Chief of Staff and Assistant Attorney General, and to Alana M. Barragan-Scott, Chief Counsel and Assistant Attorney General, at fax number 573-751-8796.

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