IN THE SUPREME COURT
STATE OF MISSOURI

No. SC91631

STATE OF MISSOURI *ex rel.* COLLECTOR OF WINCHESTER, MISSOURI; and CITY OF WINCHESTER, MISSOURI;	)	Eastern District Court of Appeals No. ED96327
Relators,	)	
v.	)	
THE HON. MICHAEL T. JAMISON, Circuit Judge of St. Louis County,	)	St. Louis County Circuit Court No. 10SL-CC02719
Respondent.	)	

RESPONDENT'S BRIEF IN OPPOSITION

BERRY & MAXSON LLC
Robert P. Berry, # 46236
Email: rberry@berrymaxson.com
Jessica W. Kennedy, #46535
Email: jkennedy@berrymaxson.com
David C. Baxter, # 62165
Email: dbaxter@berrymaxson.com
16150 Main Circle Drive, Suite 120
Saint Louis, Missouri 63017
Telephone: (314) 480-5881
Facsimile: (314) 480-5884

Attorneys for Defendants Charter Communications, Inc., Charter Communications, LLC, and Charter Fiberlink - Missouri, LLC

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I. STATEMENT OF FACTS

Relators allege that Charter is liable to pay Winchester's municipal license tax, which on its face applies *only* to "telephone companies" and providers of "telephone and telephone service" pursuant to Mo. Rev. Stat. § 94.270 and Winchester Mun. Code § 615.150, respectively. In their First Amended Petition below, Relators seek to represent a class of other Missouri cities and towns that they claim are owed similar telephone license tax payments from Charter Communications, Inc., Charter Communications, LLC, and Charter Fiberlink - Missouri, LLC ("Charter"), the defendants below. (*See* Winchester's Exhibits to Petition for a Writ of Prohibition or, in the Alternative, for a Writ of Mandamus, hereinafter "Exhibits," at 4-6.)

Yet, the Missouri General Assembly, in an effort to balance the needs of the state, the people, and the telecommunications industry, has expressly withdrawn Winchester's standing to serve as a class representative here. Section 71.675 of the Missouri Revised Statutes mandates:

> [N]o city or town shall bring any action in federal or state court in this state as a representative member of a class to enforce or collect any business license tax imposed on a telecommunications company.

On the face of their First Amended Petition below, Relators unequivocally allege that Winchester is a city of the fourth class (Exhibits at 1) seeking to serve as a

class representative (Exhibits at 4-6) in a lawsuit to enforce and collect telephone business license taxes (Exhibits at 4-8) against Charter as an alleged telecommunications company (Exhibits at 8) in a Missouri circuit court. *This is exactly what the General Assembly forbids.* Relators do not dispute this.

On October 18, 2010, Charter filed a Motion to Strike/Dismiss Class Action Claims ("Motion," Exhibits at 220-26) in light of Relators inability to represent a class pursuant to section 71.675. After full briefing, several hours of argument, and over two months of consideration, Respondent granted Charter's Motion on February 17, 2011 ("Order," Exhibits at 367-71). Respondent's Order dismissed and struck Relators' class action allegations from the First Amended Petition because Winchester lacks standing to serve as the class representative. (*Id.*)

On February 28, 2011, Relators petitioned the Missouri Court of Appeals for the Eastern District for a discretionary appeal which was denied on March 7, 2011. (Exhibits at 372). On March 22, 2011, Relators petitioned this Court for a writ of prohibition or mandamus. This Court granted a Preliminary Writ of Prohibition on May 31, 2011.

II. ARGUMENT

A. It Is Undisputed That Section 71.675 Prevents Winchester From Serving As A Class Representative.

Charter moved to strike and dismiss the class action allegations in Relators' First Amended Petition below because the General Assembly *expressly bars* Winchester from prosecuting this case as a class representative. Section 71.675 is unmistakably clear:

> [N]o city or town shall bring any action in federal or state court in this state as a representative member of a class to enforce or collect any business license tax imposed on a telecommunications company.

Based on the allegations in the First Amended Petition, and despite this constraint, this is exactly what Relators seek to do in this case. Importantly, Relators did not dispute below and have not disputed here that this statute directly prohibits Winchester from serving as a class representative for the claims alleged in the First Amended Petition. On its face, section 71.675 *required* Respondent to strike and dismiss Relators' class allegations for lack of standing to serve as a class representative.

Seeking to avoid this clear legislative mandate and constraint, Relators argued that Respondent – and now this Court – should instead take the extraordinary step of declaring section 71.675 unconstitutional based on three

unfounded theories: (1) as a statute inconsistent with a Supreme Court rule in violation of article V, section 5 of the Missouri Constitution; (2) as a "special law" in violation of article III, section 40 of the Missouri Constitution; or (3) as a violation of the "single purpose, clear title" clause of article III, section 23 of the Missouri Constitution. But under this Court's controlling precedent, which Relators simply ignore, none of these constitutional principles are implicated. In essence, Relators are left asking this Court to ignore and overturn the will of the General Assembly, even though it is the General Assembly that has the power to regulate the rights and remedies of political subdivisions. However, if Relators are dissatisfied with section 71.675, the proper remedy is to go to the General Assembly and attempt to change the law, not circumvent the General Assembly and ask this Court to ignore its will.

B. Relators Fail To Meet The High Burden Required To Show Section 71.675 Of The Missouri Revised Statutes Is Unconstitutional.

"[L]aws enacted by the legislature and approved by the governor have *a strong presumption of constitutionality*." *Strup v. Dir. of Revenue*, 311 S.W.3d 793, 796 (Mo. banc 2010) (internal citations and quotations omitted, emphasis supplied). And Missouri courts must "'*resolve all doubt in favor of [a statute's] validity* and may make every reasonable intendment to sustain the constitutionality of the statute.'" *Weigand v. Edwards*, 296 S.W.3d 453, 456 (Mo. banc 2009)

(*quoting Reprod. Health Serv. of Planned Parenthood of St. Louis Region, Inc. v. Nixon*, 185 S.W.3d 685, 688 (Mo. banc 2006) (emphasis supplied)). This Court confirmed the extreme difficulty facing a party who asserts the unconstitutionality of a statute less than two months ago, when it reiterated that "[a]n act of the legislature carries *a strong presumption of constitutionality*. A statute is presumed valid and will not be held unconstitutional unless it *clearly contravenes* a constitutional provision. The person challenging the validity of the statute has the burden of proving the act *clearly and undoubtedly* violates the constitution, and "[c]ourts may not declare statutes unconstitutional unless . . . there are *no possible interpretations* of the statute that conform to the requirements of the constitution." *Beatty v. State Tax Comm'n*, 912 S.W.2d 492, 495 (Mo. banc 1995) (emphasis supplied). Further, taxing statutes must be construed strictly, and taxes are not to be assessed unless they are expressly authorized by law." *St. Louis County v. Prestige Travel, Inc.*, SC 91228, 2011 WL 2552572, at *2 (Mo. banc June 28, 2011) (internal citations and quotations omitted, emphasis supplied).

Relators below did not and here cannot meet these extremely heavy burdens and likewise failed to show that section 71.675 is unconstitutional.

C. Section 71.675 Does Not Amend, Annul, Or Conflict With Rule 52.08, And Is Not A "Procedural" Statute.

No one disputes that article V, section 5 of the Missouri Constitution allows the Missouri Supreme Court to promulgate rules governing issues of "practice, procedure and pleadings" for Missouri's courts. "[R]ules promulgated pursuant to article V, § 5 [of the Missouri Constitution] 'supersede all statutes and existing court rules *inconsistent therewith*,' [and] *if there is a conflict* between this Court's rules and a statute, the rule always prevails *if it addresses practice, procedure or pleadings*." *State ex rel. Union Elec. Co. v. Barnes*, 893 S.W.2d 804, 805 (Mo. banc 1995) (quoting Mo. R. Civ. P. 41.02) (emphasis supplied). Relators are also correct to assert that "[t]he Court's rules may only be '*annulled or amended* in whole or in part by a law' enacted solely for that purpose." *Id.*, at 805 (*quoting* Mo. Const. art. V, § 5) (emphasis supplied).[1] Yet neither of these noncontroversial

[1] Relators cite various cases supporting these uncontroversial rules. For example, the court from *Ridgway v. Asibem, Inc.* found a rule and a statute to conflict because the rule had recently been updated to remove terms that were in the old rule and statute. 810 S.W.2d 352, 353-54 (Mo. App. W.D. 1991). As explained herein, Rule 52.08 was never amended to remove terms contained in section 71.675, so it cannot be said that Rule 52.08 considers or affects what parties have standing to serve as a class representative, the only subject of section

rules is implicated here because section 71.675 is not inconsistent with or in conflict with Rule 52.08 and because section 71.675 is not a procedural statute but is instead substantive.

In an attempt to emphasize the power of Supreme Court rules, Relators correctly assert that "the rules of court are binding on courts, litigants, and counsel, and it is the court's duty to enforce them." *Sitelines, L.L.C. v. Pentstar Corp.*, 213 S.W.3d 703, 707 (Mo. App. E.D. 2007). While this statement is true, that is not a court's only consideration, as it is also, "[t]he courts' duty is to find, declare, apply and enforce the law." *State v. Freeman*, 269 S.W3d 422 (Mo. banc 2008) (Wolfe, J., concurring).

71.675. *Miller v. Russel* also dealt with a rule which was designed to change the effect of a statute and is similarly inapplicable to the case at hand. 593 S.W.2d 598, 603-04 (Mo. App. W.D. 1979). Another case cited by Relators is also inapplicable because it deals with a rule and a statute which conflicted on the same specific issue. *State ex rel. K.C. v. Gant*, 661 S.W.2d 483, 484 (Mo. banc 1983) (holding that a rule that required a hearing directly conflicted with a statute that allowed but did not mandate the same hearing). Here, section 71.675 addresses a specific topic (standing to serve as a class representative) that Rule 52.08 does not address at all.

Respondent properly applied both Rule 52.08 and section 71.675 below to grant the Motion to Strike/Dismiss. Even this Court "must enforce the law as it is written." *Turner v. Sch. Dist. of Clayton*, 318 S.W.3d 660, 668 (Mo. banc 2010). Therefore, this Court should deny Relators' requested relief and affirm Respondent's decision below.

1. There Is No Conflict Between The Statute And The Rule.

Relators incorrectly assume – in opposition to the weight of the case law – that section 71.675 somehow conflicts with, annuls, or amends the Rule 52.08 class action procedures. As a matter of fact and law, however, controlling precedent demonstrates that this is simply not true. In fact, Respondent properly found "no conflict between the statute and the rule. Section 71.675 is not procedural; it merely addresses whether cities and towns have standing to act as class representatives when suing telecommunications companies for taxes. Rule 52.08 addresses general procedures to be applied when certifying a class; it does not address standing." (Exhibits at 368.)

a) Section 71.675 Does Not Conflict With Rule 52.08.

Although section 71.675 is not a procedural statute (*see* Section 2 *infra*), it still does not conflict with, annul, or amend Rule 52.08 even if section 71.675 were found to be procedural. Merely because a statute and a rule address the same general topic (here, class actions) does not mean that they are in conflict or that the

statute has annulled or amended the rule. To the contrary, "[w]here the legislature has enacted a statute pertaining to a procedural matter [that] is not addressed by or inconsistent with any [S]upreme [C]ourt rule, *the statute must be enforced*." *State v. Teer*, 275 S.W.3d 258, 264 (Mo. banc 2009) (emphasis supplied); *State ex rel. Kinsky v. Pratte*, 994 S.W.2d 74, 76 (Mo. App. E.D. 1999). When determining whether a statute and rule conflict for constitutional purposes, this Court requires that the statute must first contradict a *specific procedural issue* addressed by a rule. *See State v. Jaco*, 156 S.W.3d 775, 781 (Mo. banc 2005) (holding that although a statute regulated conduct of criminal trials, a general subject also regulated by the rules, no rule touched the *specific* issue regulated by the statute so there was no conflict).

Rule 52.08, however, says *nothing* about who specifically has legal standing to move a court to employ those procedures and does not address any particular individuals or entities who may or may not serve as class representatives in any particular circumstances. By contrast, section 71.675 addresses only the very narrow substantive issue of whether cities and towns have *standing* to act as class representatives when suing telecommunications companies for the collection of various taxes.

Fatally, Relators point to *nothing* in the Rule 52.08 class action procedure that says *anything at all* about the standing of cities and towns to serve as a class

representative, or any guarantee that the class action mechanism described in the rule must be available to all litigants. This is not surprising being it is the General Assembly that empowers political subdivisions with the power to sue. *See infra* § F.1.

Attempting to create a conflict, Relators spend extended portions of their brief referring to the dictionary definitions of the terms "amend," "alter," "modify," " annul," "inconsistent," "variance," and "conflict" (Brief of Relators at 8-9, 12-13, 18). However, resorting to a dictionary is unnecessary here because this Court already has made clear that a statute affecting to whom a rule can apply does not conflict with, alter, or amend that rule. *State ex rel. Mo. Pub. Defender Comm'n v. Pratte*, 298 S.W.3d 870, 886 (Mo. banc 2009) (the "*Missouri Public Defender*" case).

In the *Missouri Public Defender* case, this Court found that Missouri Rule of Criminal Procedure 31.02(a), which grants judges broad discretion to appoint lawyers for indigent criminal defendants, and a "competing" statute (Mo. Rev. Stat. § 600.021) that limits the same judges' discretion by excluding public defenders from the pool of lawyers who could be appointed under the rule were not in conflict; therefore, the statute was upheld as constitutional. *Mo. Pub. Defender Comm'n,* 298 S.W.3d at 886. The facts and law behind the *Missouri Public Defender* case parallel the situation at hand almost exactly, where a statute

(section 71.675) prevents the applicability of a rule (52.08) to certain classes of entities (here, cities and towns).

Relators have attempted to insert the language of section 71.675 into the language of Rule 52.08 as an "unless" clause in the hopes of proving a conflict, but when this same technique is applied to the result in this Court's *Missouri Public Defender* case, the fallacy of Relators' position and its incompatibility with current case law become readily apparent:

Plaintiffs would like this *unless* clause to be unconstitutional . . .	**. . . But this Court found the following *unless* clause to be constitutional.**
Rule 52.08(a) still permits one or more members of a class to sue on behalf of others, **unless the member is a city or town seeking to enforce or collect a business license tax imposed on a telecommunications company.** (*Respondents' Brief at 13*)	Rule 31.02(a) permits the Court to appoint counsel to an indigent litigant, **unless that counsel is a public defender, assistant public defender, or deputy public defender.** (*Mo. Pub. Defender Comm'n*, 298 S.W.2d at 886.)

Despite Relator's claims, these circumstances are highly analogous – in each case the Supreme Court Rule created a procedure within the Court's discretion while the General Assembly statutorily qualified or limited the applicability of that rule to certain people or entities. The application of the rule in the *Missouri Public Defender* case to the facts here is unequivocal: Relators' *assumption* that limiting

cities' and towns' ability to serve as a class representative constitutes a conflict, amendment, or annulment of Rule 52.08 under the Missouri Constitution should be rejected.

Relators assume that because Rule 52.08 contains no limits as to who can avail themselves of the procedures described in the Rule that any litigant has the right to do so. The state of Missouri similarly argued unsuccessfully in the *Missouri Public Defender* case that the Rule took precedence over the statute. This Court determined that by its argument, "the state reads language into the rule that simply is not there. The state argues that because the rule contains no limits as to what counsel a trial judge may choose to appoint, a trial judge may appoint any lawyer." *Mo. Pub. Defender Comm'n*, 298 S.W.3d at 886. This Court went on to explain that "reading the rule with section 600.021.2 indicates that the only lawyers a trial judge may appoint in their private capacities are those who are not also public defenders." *Id.* Similarly, reading Rule 52.08 with section 71.675 indicates that the only parties who make take advantage of the class action procedures are those who are not cities and towns attempting to enforce or collect a business license tax against a telecommunications company.[2]

[2] The other two analogies from the Missouri Public Defender case cited by Relators (Brief of Relators at 20-21) are irrelevant to the discussion in this case

Relators' brief does correctly state that "Rule 31.02(a) and § 600.021.2 address different things. While the universe of available counsel may be slightly smaller after § 600.021.2, this does not prevent Rule 31.02(a) from being given its full effect." (Brief of Relators at 20). Similarly, Rule 52.08 and section 71.675 address different things (class action procedure versus standing to serve as a class representative). While the universe of plaintiffs who can serve as a class representative for specific tax issues is infinitesimally smaller after § 71.675, this does not prevent Rule 52.08 from having its full effect.

Relators' also appear to assert that analogy to the *Missouri Public Defender* case is improper because section 71.675 was enacted after Rule 52.08. (Brief of Relators at 20). However, in the *Missouri Public Defender* case, the statue was also enacted after the rule, meaning that both section 71.675 and the statute upheld in *Missouri Public Defender* limited the application of an existing rule. Mo. Rev. Stat. § 600.021; Mo. R. Crim. P. 31.02. Also, the *Missouri Public Defender* case does not discuss the chronology of the statute and rule. It does, however, explicitly reject an argument practically identical to Relators'. As a result, the *Missouri Public Defender* case supports the finding of no conflict here.

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because they deal with conflicts between statutes and regulations, a subject not addressed by article V, section 5 of the Missouri Constitution and not at issue here.

b) Finding A Conflict Is An Extreme Remedy And Should Be Avoided.

Because finding a statute unconstitutional is an extreme remedy, courts routinely seek to ensure that a statute is not unnecessarily read to annul or amend a rule – even in those cases where the face of the statute and rule appear to conflict at first glance (which is not the case here). *E.g. Lorenzini v. Short*, 312 S.W.3d 467, 471 (Mo. App. E.D. 2010). For example, Rule 90.08 allows for a default judgment against a garnishee for failure to answer interrogatories *only* after the garnishor files a motion to compel answers, the court orders answers, the garnishee fails to comply, and the garnishor or the court moves for a default judgment. However, section 525.140 of the Missouri Revised Statutes allows the garnishor to bypass most of the process set forth in Rule 90.08 and obtain a default judgment as soon as the garnishee fails to respond to interrogatories in a timely fashion. When examining these two seemingly inconsistent mechanisms, the Missouri Court of Appeals for the Eastern District found them to *not* be in conflict for constitutional purposes and, therefore, upheld the statute. *Lorenzini,* 312 S.W.3d at 471.[3] As

[3] Some other examples of Missouri courts finding rules and statutes on similar subjects not to be in conflict include *State v. Teer*, 275 S.W.3d 258, 262 (Mo. banc 2009); *State ex rel. Heilmann v. Clark*, 857 S.W.2d 399, 401 (Mo. App. W.D. 1993); and *Northwest Prof'l Condominium Ass'n v. Kayembe*, 190 S.W.3d 447,

such, Relators' invitation to this Court to nullify a state statute where no actual conflicting rule exists should be rejected, especially since Rule 52.08 says *nothing* about cities' and towns' standing to serve as a class representative, which is the sole subject of section 71.675.

2. The Statute (Section 71.675) Is Not Procedural.

Even if this Court were to find that section 71.675 somehow conflicts with Rule 52.08 (which it does not), article V, section 5 of the Missouri Constitution still would not be implicated here because section 71.675 addresses the *substantive* issue of standing. Under Missouri law, even when an apparent conflict exists between a Supreme Court Rule and a statute, article V, section 5 only gives the Supreme Court Rules supremacy over statutes on issues of "practice, procedure or pleadings." Therefore, Rule 52.08 cannot conflict with section 71.675 (a substantive statute) as to make it inoperable because "the Supreme Court can adopt rules relating to practice, procedure and pleading, but cannot 'change substantive rights.'" *In re A.A.R.*, 71 S.W.3d 626, 635 (Mo. App. W.D. 2002) (*quoting* Mo. Const. art. V, § 5); *see State v. Reese*, 920 S.W.2d 94, 95 (Mo. banc 1996). While Relators insist that section 71.675 must be procedural because it deals with similar

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448-49 (Mo. App. E.D. 2006). In each, the courts refused to assume that a statute and rule were in conflict simply because each dealt with the same general subject matter.

issues as Rule 52.08, Missouri courts have held that even statutes that are almost identical to rules are substantive, not procedural. *Gillespie v. Rice*, 224 S.W.3d 608, 612 (Mo. App. W.D. 2006) (holding that Mo. Rev. Stat. § 507.100, which *required* courts on a motion to substitute parties upon death, was not procedural even though Rule 52.13 *permitted* a court to substitute parties upon death).

The statute at issue here, section 71.675, *is not a procedural statute – it is a substantive standing and capacity statute*.[4] It mandates that no "city or town *shall bring an[] action*" as a class representative. Mo. Rev. Stat. § 71.675 (emphasis supplied). In reviewing similar statutes, this Court has found that the same "shall bring an action" language is the statutory language the General Assembly uses when it intends to address the substantive issue of standing. *E.g. Farmer v. Kinder,* 89 S.W. 3d 447, 451-452 (Mo. banc 2002); Mo. Rev. Stat. § 447.575.[5]

[4] Section 71.675 is also substantive as it provides telecommunications company defendants the right to be free from class claims for causes of actions brought by cities or towns for certain alleged tax obligations.

[5] When declaring a procedural statute ineffective to create standing, the Eastern District Court of Appeals stated, "We refuse to allow appellant to manipulate this procedural statute to establish the *substantive right of standing* . . .

While Relators make many arguments regarding standing to bring suit (which no one has yet actively challenged here), Relators do not point to any case law supporting their argument that section 71.675 does not relate to standing to serve as a class representative but is, instead, a procedural statute. (emphasis supplied).

By contrast, the Missouri Revised Statutes contain many other examples of statutes which grant or deny standing using language similar to section 71.675. E.g. Mo. Rev. Stat. § 448.070 (denying a condominium owner standing to bring an action for partition or division of common elements under certain circumstances); § 570.123 (denying an original holder of a bad check standing to bring an action for a civil penalty and attorneys' fees under certain circumstances); § 302.756.3 (granting the chief counsel to the state highways and transportation commission standing to sue to recover a civil penalty); § 370.150.4 (granting the director of the division of credit to bring and defend actions in the name of a credit union).

Similarly, when courts consider the ability of one person to bring or defend a claim as a representative of another, they examine whether or not the representative has standing to act as such and bring or defend the claim of another that does not belong to them. *S.L.J. v. R.J.*, 778 S.W.2d 239, 243 (Mo. App. E.D. 1989) (holding that a natural father loses his standing to make claims as a

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." *Alexian Bros. Sherbrooke Vill. v. St. Louis County,* 884 S.W.2d 727, 729 (Mo. App. E.D. 1994)

representative of his children once a guardian ad litem is appointed); *Citizens for Rural Pres., Inc. v. Robinet*, 648 S.W.2d 117, 133 (Mo. App. W.D. 1983) (holding that an association has representative standing to sue for injuries to its members under certain circumstances); *Mikesic v. Trinity Lutheran Hosp.*, 980 S.W.2d 68, 73 (Mo. App. W.D. 1998) (stating that a wife's appointment as a "next friend" granted her standing to bring a claim as a representative of her husband). Winchester's attempt to serve as a class representative under Rule 52.08 similarly implicates standing, a substantive, not procedural, issue.

The General Assemblies' power to limit or grant standing to political subdivisions also indicates that section 71.675 is substantive and not procedural. Section 71.675 speaks to whether a Missouri city or town has standing to sue as a class representative for others in a class action. The General Assembly, not the courts, confers standing and power to sue. This is nothing new. Both Missouri and federal courts treat standing as a jurisdictional matter, which cannot be affected by the courts. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969); *Farmer v. Kinder*, 89 S.W.3d 447, 451 (Mo. banc 2002). Thus, any grant of jurisdiction is seen as a grant of substantive rights, not a procedural mechanism. *Hughes Aircraft Co. v. United States*, 520 U.S. 939, 951 (1997); *Ass'n of Westinghouse Salaried*

Employees v. Westinghouse Elec. Corp., 348 U.S. 437, 440 (1955) (*overruled on other grounds by Smith v. Evening News Ass'n.*, 371 U.S. 195 (1962)).[6]

As a result, this Court's inability to promulgate rules altering substantive rights also prevents this Court's rules from altering jurisdiction since "[t]he constitution's express limitation that rules should 'not change substantive rights' prohibits the use of such power to create jurisdiction," a substantive right. *State ex rel. Wade v. Frawle*y, 966 S.W.2d 405, 406-07 (Mo. App. E.D. 1998) (*quoting* Mo. Const. art. V, § 5); *Glasby v. State*, 739 S.W.2d 769, 771 (Mo. App. E.D. 1987). Because standing to sue is a jurisdictional issue, "the Supreme Court rules cannot expand or shrink jurisdiction." *City of St. Louis v. Hughe*s, 950 S.W.2d 850, 853 (Mo. banc 1997); *Scott v. Scott*, 882 S.W.2d 295, 297 (Mo. App. E.D. 1994). The statute, not the rule, is supreme on this issue – even if the two were in conflict (although they are not).

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[6] The scope of Section 71.675 also demonstrates that it is intended to affect substantive rights. Section 71.675 is not limited to claims in state court, but also extends to claims in federal courts. It is uncontroversial that under the *Erie* Doctrine only substantive state law applies in federal court and federal procedure otherwise controls. As the General Assembly would be well aware of the *Erie* Doctrine, the inclusion of federal courts in Section 71.675 indicates that it is intended to affect substantive, not procedural, rights.

As there is no conflict between Rule 52.08 and Section 71.675 and Section 71.675 is a substantive provision, there is no basis to declare Section 71.675 unconstitutional.

D. Section 71.675 Is Not A Special Law.

Relators also argue that section 71.675 is an unconstitutional "special law" pursuant to article III, section 40 of the Missouri Constitution. Respondent correctly rejected Relators' special law argument, finding that "the statute does not . . . contain a 'closed' or 'fixed' category based on permanent characteristics such as historical facts, geography or constitutional status." (Exhibits at 369.)

1. Section 71.675 Passes All Three Special Law Tests.

a) Section 71.675 Is "Open-Ended".

This Court's most clearly applicable test to determine whether a law is a special law is to ask whether the statute creates a "closed" or "open" class to be regulated. *See Harris v. Mo. Gaming Comm'n*, 869 S.W.2d 58, 65 (Mo. banc 1994). This Court applied this same test in the context of municipal taxation in *City of Springfield v. Sprint Spectrum, L.P.*, 203 S.W.3d 177, 184 (Mo. banc 2006). This Court stated: "When dealing with laws regarding taxation or powers of political subdivisions, this Court has recognized that whether a law is special or general can most easily be determined by looking to whether the categories created under the law are open-ended or fixed, based on some immutable characteristic."

Id. This Court used this test to strike down portions of the Municipal Telecommunications Business License Tax Simplification Act ("Act") that divided municipalities into categories that were permanently fixed based upon historical actions, thereby permanently treating some municipalities differently from others. *Id.* at 185-86. This Court found that one portion of the Act created an impermissible "closed" target of the legislation, and therefore was an improper special law.

The circumstances here are quite different. Section 71.675 differs from other aspects of the Act in that it treats all cities and towns the same, both now and in the future, thereby making it a general regulation. It applies to all cities and towns and is, therefore, a proper "open" class law and cannot be considered a "special" law. Relators identify no Missouri city or town excluded from the scope of this statute – because there are none. Further, all cities or towns that come into existence after today will be equally impacted by the law. Because section 71.675 does not contain a "closed" or "fixed" categorization, the statute need only have "a rational relation to a legitimate legislative purpose" in order to remain enforceable. *O'Reilly v. City of Hazelwood*, 850 S.W.2d 96, 99 (Mo. banc 1993).

Relators cite *City of Springfield* in an attempt to show that section 71.675 is a special law, but that opinion actually cuts against Relators' argument. As this Court explained there:

> A law is general or "open-ended" if "the status of a political subdivision under [the] classification could change." *State ex rel. City of Blue Springs v. Rice*, 853 S.W.2d 918, 921 (Mo. banc 1993); *Harris*, 869 S.W.2d at 65. "Legislation that is not open-ended typically singles out one or a few political subdivisions by permanent characteristics." *O'Reilly v. City of Hazelwood*, 850 S.W.2d 96, 99 (Mo. banc 1993). And, "[c]lassifications based on historical facts, geography, or constitutional status focus on immutable characteristics and are therefore facially special laws." *Harris*, 869 S.W.2d at 65 (emphasis added); *Tillis v. City of Branson*, 945 S.W.2d 447, 449 (Mo. banc 1997).

203 S.W.3d at 184.

Reading the Act one clause at a time, this Court found that the first clause of section 92.086(1) was not a special law and "appear[ed] to be open-ended" because it applied to "any" municipality that imposed a business license tax. *Id.* This acceptable portion was even narrower than section 71.675, which regulates *all* cities and towns. While this Court went on to find a different clause of section 92.086(1) unconstitutional, this decision was based on the fact that the later clause divided municipalities into fixed groups based on *past* actions. *Id.* at 184-185. Section 71.675 does not make any such similar historical and immutable divisions.

Missouri courts have continued to find acceptable general laws which create open (although frequently narrow) classes. In *State ex rel. Slah, L.L.C. v. City of Woodson Terrace*, the Missouri Court of Appeals for the Eastern District found that a statute which only applied to any city of the fourth class with between 4,100 and 4,200 inhabitants located in a charter county with more than 1 million inhabitants (which in fact only included one Missouri city, Woodson Terrace) was an open-ended general law. No. ED 94904, 2011 WL 1119044, at *11 (Mo. App. E.D. March 29, 2011). If a law with open-ended but narrowly-defined classes like this one is acceptable, surely a statute like section 71.675 that regulates all cities and towns is an acceptable general law that regulates an open class.

b) Section 71.675 Passes the *Reals* Test.

While Relators have focused almost exclusively on the special law test from *City of Springfield* up to this point, Relators now, for the first time, suggest that section 71.675 violates the special law test articulated in *Reals v. Courson*. 164 S.W.2d 306, 307-08 (Mo. 1942).[7] This is despite this Court's frequent and recent

[7] Section 71.675 passes the third special law test, not strongly advocated for by either side, mentioned in *City of Springfield v. Smith*, 19 S.W.2d 1 (Mo. banc 1929), because all cities and towns are treated equally. Even if the subject of section 71.675 is somehow thought to be telecommunications companies (which it is not), it is not a violation of the test to treat one industry different when that

statements affirming the usefulness of the *Harris* test which focused on whether or not a class was "open-ended." *E.g. K.C. Premier Apartments, Inc. v. Mo. Real Estate Comm'n*, SC 91125, 2011 WL 2848191, at *8 (Mo. banc July 19, 2011); *City of Sullivan v. Sites*, 329 S.W.3d 691, 694 (Mo. banc 2010); *Alderson v. State*, 273 S.W.3d 533, 538 (Mo. banc 2009). Although Relators try to draw support from the fact that *Reals* was cited twice by this Court in *City of Springfield* (203 S.W.3d at 184-85), this Court clearly applied and approved of the *Harris* test in a nearly identical context to the current case. *Id.* at 184.

Nonetheless, section 71.675 also passes the inapplicable *Reals* test. The portion of *Reals* quoted by *City of Springfield* asserted that "a general law is a 'statute which relates to persons or things as a class.'" 203 S.W.3d at 184 (*quoting Reals*, 164 S.W.2d at 307). Section 71.675 properly regulates cities and towns as a class. Missouri law is replete with statutes that regulate all cities, all towns, or even a subclass of cities. *E.g.* Title VII of the Missouri Revised Statutes. If section 71.675 impermissibly regulates cities and towns but not other municipal subdivisions, then most of Title VII is similarly unconstitutional. And although not the object of section 71.675, regulation of telecommunications companies does not create special laws (*see* Section 2 *infra*). Section 71.675 would only violate the

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industry has a long history of being specially regulated. *Borden Co. v. Thomason*, 353 S.W.2d 735, 743-44 (Mo. banc 1962).

Reals test if it singled out a specific telecommunications company, which it does not do because the term "telecommunications companies" is properly a complete class.

The law struck down in *Reals* stands in stark contrast to section 71.675. The *Reals* court struck down a statute because it only applied to one county and excluded all other counties and city and town school districts. 164 S.W.2d at 310. In contrast, section 71.675 regulates *all* cities and towns in Missouri. Although not the object of section 71.675, the law also affects *all* telecommunications companies. This is not a law which singles out a single municipal subdivision or telecommunications company, and therefore is not a special law under *Reals*.

Finally, while Relators attempt to cite *Reals* for the proposition that a law is special if it is unreasonable, unnatural, or arbitrary, subsequent case law confirms that the "[l]awmakers' discretion in defining a class to which a law applies should be disturbed only when the created class is clearly arbitrary, unreasonable, ***and*** unjust." *City of Sullivan v. Sites*, 329 S.W.3d 691, 693 (Mo. banc 2010). Section 71.675 is none of these things. In fact, the state of Missouri can be reasonably concerned with the impact of class actions on telecommunications companies. As even Relators' brief pointed out, class actions can have extortionist tendencies, putting undue pressure on defendants. (Brief at p. 26-27, n.10.) Much like the concerns Congress had about class actions when enacting the Class Action

Fairness Act, the Missouri General Assembly has legitimate and non-arbitrary concerns here regarding the impact of class action claims against telecommunications companies for certain tax issues.

2. Regulation Of Telecommunications Companies Does Not Create Special Laws.

Relators argued for the first time in their petition to this Court and subsequently in their brief that section 71.675 is a special law because it regulates only telecommunications companies, but not all other Missouri businesses. (Relators' Suggestions in Support of Petition for a Writ of Prohibition or, in the Alternative, for a writ of Mandamus at 18-19; Brief of Relators at 24-27). Relators essentially argue that *all* such statutes focusing on one type of industry would be unconstitutional "special laws." This assertion is simply not the law.

Even if the subject of section 71.675 is somehow thought to be telecommunications companies instead of cities and towns (the true subject of the statute), a law is not a special law simply because it treats one industry differently than others, especially where, as here, that industry has a long history of being specially regulated. *Borden Co. v. Thomason*, 353 S.W.2d 735, 743-44 (Mo. banc 1962) (allowing special laws based on regulated nature of specific industries). Telecommunications and telephone service are heavily regulated in Missouri. *Cf.*

Ogg v. Mediacom, L.L.C., 142 S.W.3d 801 (Mo. App. W.D. 2004) ("public utilities, such as telephone . . . are regulated by the Missouri Public Service Commission on a statewide basis."); *State ex rel. Mo. Cable Telecomm. Ass'n v. Mo. Pub. Serv. Comm'n*, 929 S.W.2d 768, 772 (Mo. App. W.D. 1996); *e.g.* Mo. Rev. Stat. § 392.550 (requiring providers of VoIP to have a registration with the state). In fact, hundreds of Missouri statutes single out telecommunications and telephone companies and thousands more statutes isolate and focus on other unique types of businesses operating within the State of Missouri.[8]

[8] The actual target of section 71.675, political subdivisions of the state (which includes cities), are also highly regulated. For example, chapters 71 through 100 of the Missouri Revised Statues contain thousands of statutes regulating cities in a wide variety of subject areas including municipal utilities, taxation, financing, health care, courts, housing, police and firemen's retirement, zoning and planning, and parks. Chapters 46 through 70 contain thousands of statutes regulating counties. Many other statutes also regulate various municipal subdivisions. Therefore, there is nothing unusual or unconstitutional about a statute (like section 71.675) that regulates all cities and towns, especially since political subdivisions only have the powers delegated to them by the General Assembly. *See, e.g.*, *Amos v. City of Noel*, 276 S.W.3d 355, 356 n.2 (Mo. App. S.D. 2009).

In any event, Relators identify no Missouri telecommunications company or city excluded from the scope of this statute. There are none. Further, all telecommunications companies or cities that come into existence after today will be equally impacted by the law. As a result, section 71.675 does not contain a "closed" or "fixed" categorization of telecommunications companies or cities and is, therefore, constitutional. *O'Reilly v. City of Hazelwood*, 850 S.W.2d 96, 99 (Mo. banc 1993).

Relators cite *Planned Indus. Expansion Authority v. Southwestern Bell Tel. Co.* ("*P.I.E.*") in an attempt to claim that statutes that regulate telecommunications differently than other utilities are unconstitutional special laws. 612 S.W.2d 772 (Mo. banc 1981). However, in *P.I.E.*, this Court explicitly noted that the parties had not addressed the special law issue. *Id*. at 776. This is especially relevant in this context because laws which at first glance appear to be impermissible special laws are frequently determined to be acceptable general laws after full briefing and argument. *E.g. Walters v. City of St. Louis*, 259 S.W.2d 377, 383 (Mo. banc 1953) (holding that a law which only regulated one city as the only constitutional charter city with a population over 700,000 was not a special law); *Treadway v. State,* 988 S.W.2d 508, 510 (Mo. banc 1999) (holding that a statute which only applied to any city not within a county (which only applies to St. Louis City) and a few counties with very specific governmental structures and populations was not a special law).

While the law in *P.I.E.* may have appeared to be a special law, had the parties been given a chance to fully brief and discuss the issue, this Court may have found that it was an acceptable general law.

In another argument not raised at any point before in this case, Relators now argue that although the Court in *P.I.E.* opined on a subject that was dicta and not even briefed by the parties, this determination should be followed as "judicial dictum." (Brief of Relators at 25). Relators cite two out-of-state cases that discuss the difference between citable "judicial dictum" and less persuasive "obiter dictum" and claim the critical language from the *P.I.E.* decision cited by Relators is judicial dictum. It is not surprising that Relators cite these out-of-state cases, as clearly applicable Missouri case law is less favorable to their position. Under Missouri law, "'[s]tatements . . . are obiter dicta [if] they [are] not essential to the court's decision of the issue before it.'" *Brooks v. City of Sugar Creek*, 340 S.W.3d 201, 212 (Mo. App. W.D. 2011) (*quoting Richardson v. QuikTrip Corp.*, 81 S.W.3d 54, 59 (Mo. App. W.D. 2002) (alterations in original). *P.I.E.'s* discussion of special laws was clearly not essential to the holding, as this Court first ruled that the statute violated article I, section 13 of the Missouri Constitution, not the prohibition against special laws from article III, section 40. 612 S.W.2d at 777. Obiter dictum can be and frequently is ignored by Missouri courts. *Id.*; *Parker v. Bruner*, 683 S.W.2d 265 (Mo. banc 1985) ("[O]biter dictum [is] not

authority as a precedent in Missouri."); *Husch & Eppenberger, LLC v. Eisenberg*, 213 S.W.3d 124, 132 (Mo. App. E.D. 2006); *In re Incorporation of City of River Bend*, 530 S.W.2d 704, 707 (Mo. App. 1975). "The Court's [obiter] dicta are not binding . . . . At most, they have persuasive force." *A.W. McPherson v. U.S. Physicians Mut. Risk Retention Group*, 99 S.W.3d 462, 484 (Mo. App. W.D. 2003). In fact, when an issue is not litigated in a case (like the special law issue in P.I.E.), language discussing that issue "is not proper authority to sustain [a party's] position." *In re Incorporation of City of River Bend*, 520 S.W.2d at 707. As such, the discussion in *P.I.E.* should not be considered persuasive here.

3. Section 71.675 Has A "Rational Relationship To A Legislative Purpose."

"A law based on open-ended characteristics is not facially special and is presumed to be constitutional [and is] not special if the classification is made on a reasonable basis." *Jefferson County Fire Prot. Dists. Ass'n v. Blunt*, 205 S.W.3d 866, 870 (Mo. banc 2006). Relators bear the heavy burden to show that section 71.675 is "arbitrary and without a rational relationship to a legislative purpose." *Id.* They cannot meet this burden. In Missouri, there are hundreds of cities and towns, each with its own separate tax ordinances and each in a statutory class with its own municipal tax enabling statute. There are vast and significant differences between these statutory classes, enabling statutes, and ordinances – and

each city or town interacts with telecommunications companies in its own unique, case-by-case way. Municipal taxation of voice communications is a complicated undertaking, due in no small part to the heavily regulated nature of the telecommunications industry and municipal subdivisions. Past efforts by the General Assembly to simplify the assessment and collection of municipal license taxes on telephone and telecommunications companies, and do so in a balanced way to protect the interest of the Missouri, testify to this complexity. See *e.g.* Mo. Rev. Stat. §§ 92.074 – 92.095 (ruled unconstitutional by *City of Springfield v. Sprint Spectrum, L.P.*, 203 S.W.3d 177 (Mo. banc 2006)). Given the vast differences between cities, the heavily regulated nature of the telecommunications industry (*see supra*), the state's concerns of costs to telecommunications companies, and the complexity of the license tax at issue in this case, there is nothing "arbitrary" or irrational about the Missouri General Assembly choosing to disqualify cities and towns from standing to serve as a proxy for one another in a representative class action.

E. Section 71.675 Has A Clear Title And A Single Purpose.

Respondent also found that section 71.675 "fairly relates to the subject expressed in the title" of the bill from which it came. (Exhibits at 370.) This is not error.

This type of technical challenge to the constitutionality of a statute is strongly disfavored by Missouri courts, and the party challenging a statute on such procedural grounds bears a very heavy burden. *Fust v. Attorney Gen. for the State of Mo.*, 947 S.W.2d 424, 427 (Mo. banc 1997). "Attacks against legislative action founded on constitutionally imposed procedural limitations are not favored; [this Court] ascribe[s] to the General Assembly the same good and praiseworthy motivations as inform [its] decision-making process. Therefore, this Court interprets [the Constitution's] procedural limitations liberally and will uphold the constitutionality of a statute against such an attack unless the act *clearly and undoubtedly* violated the constitutional limitation." *Hammerschmidt v. Boone County*, 877 S.W.2d 98, 102 (Mo. banc 1994) (emphasis supplied). Relators do not come close to meeting this standard.

The Missouri Constitution generally requires that "no bill shall contain more than one subject which shall clearly be expressed in its title." Mo. Const. art. III, § 23. "'The test to determine if a bill contains more than one subject is whether all provisions of the bill fairly relate to the same subject, have a natural connection therewith or are incidents or means to accomplish its purpose.'" *Rentschler v. Nixon*, 311 S.W.3d 783, 787 (Mo. banc 2010) (*quoting Stroh Brewery Co. v. State*, 954 S.W.2d 323, 327 (Mo. banc 1997)). The bill passed by the General Assembly

that created section 71.675 (the 2005 House Bill 209, hereinafter "HB 209"), is entitled:

> AN ACT to amend chapters 71, 92, and 227, R.S.Mo., by adding thereto eighteen new sections *relating to* assessment and *collection of various taxes on telecommunications companies*, with an effective date for certain sections.

(Emphasis supplied.) The single, clear title of HB 209 is limited to "assessment and collection of various taxes on telecommunications companies" – and this is exactly what section 71.675 accomplishes by limiting representative standing in collection lawsuits. Section 71.675 falls squarely within this single purpose and is more than adequately described by this clear title. This section is, therefore, constitutional.

The Missouri Constitution's clear title rule mandates that a bill's title cannot be "so broad and amorphous that it describes most, if not all, legislation passed by the General Assembly; rather the title fairly identifies the contents of the bill." *Trout v. State*, 231 S.W.3d 140, 145 (Mo. banc 2007) (internal quotations omitted). This rule also requires that a bill's title not be so specific that "'it would reasonably lead to the belief that nothing was included except that which is specified.'" *Drury v. City of Cape Girardeau*, 66 S.W.3d 733, 739 (Mo. banc 2002) (*quoting 508 Chestnut v. City of St. Louis*, 389 S.W.2d 823, 829 (Mo. 1965)). HB 209 meets

both criteria. On the other hand, "for bills that have 'multiple and diverse topics' within a single, overarching subject, that subject may be 'clearly expressed by . . . stating some broad umbrella category that includes all the topics within its cover.'" *Jackson County Sports Complex Auth. v. State*, 226 S.W.3d 156, 161 (Mo. banc 2007) (*quoting Mo. State Med. Ass'n v. Mo. Dept. of Health*, 29 S.W.3d 837, 841 (Mo. banc 2001)). While the topics that SB 209 regulates are not very "diverse," they all fall under the umbrella of the regulation of telecommunications.

Relators continue to argue that section 71.675 must be struck down because *other* portions of SB 209 fall outside the single subject and clear title of the bill (which they do not). (Brief of Relators, at 31-34.) However, section 71.675 must remain in force because that section *read by itself* falls within the single subject and clear title of HB 209, even if the other sections of the bill are unconstitutional. If a bill contains more than one subject, the properly described portion remains constitutional if "the Court is convinced beyond a reasonable doubt that one of the bill's multiple subjects is its original, controlling purpose and that the other subject is not." *SSM Cardinal Glennon Children's Hosp. v. State*, 68 S.W.3d 412, 417 (Mo. banc 2002) (upholding the constitutionality of the portions of a bill that fell within the bill's title). Relators acknowledge this in their brief (Brief of Relators at 34) by citing and quoting a case decided by this Court less than two months ago that "requires the specific provisions alleged to violate the original purpose, clear

title, and single subject provisions to be severed rather than declaring the entire bill invalid." *St. Louis County v. Prestige Travel, Inc.*, SC 91228, 2011 WL 2552572, at *6 (Mo. banc June 28, 2011). While Relators suggest the severance procedure is unwise, they point to no case law directly challenging it. As section 71.675 clearly relates to the "collection of various taxes on telecommunications companies," this section standing alone satisfies the requirements of article III, section 23. Additionally, the Missouri statute governing severability states:

> The provisions of every statute are severable. If any provision of a statute is found by a court of competent jurisdiction to be unconstitutional, the remaining provisions of the statute are valid unless the court finds the valid provisions of the statute are so essentially and inseparably connected with, and so dependent upon, the void provision that it cannot be presumed the legislature would have enacted the valid provisions without the void one; or unless the court finds that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

Mo. Rev. Stat. § 1.140.

When considering whether to sever portions of a statute, courts consider several factors including "whether the provision is essential to the efficacy of the

amendment, whether it is a provision without which the amendment would be incomplete and unworkable, and whether the provision is one without which the bill may not have been adopted." *Cardinal Glennon*, 68 S.W.3d at 417. These factors weigh strongly in favor of severing and preserving section 71.675. The single, clear title of HB 209 is limited to "assessment and collection of various taxes on telecommunications companies" – this is exactly what section 71.675 accomplishes. To the extent *other* portions of the Act might later be found to be unconstitutional, this Court has already found that section 71.675 is severable from the rest of the bill. *See City of Springfield v. Sprint Spectrum, L.P.*, 203 S.W.3d 177, 188 (Mo. banc 2006).[9] Article III, section 23 of the Missouri Constitution, therefore, does not invalidate the statute here.

[9] Certain portions of HB 209 relate to public right-of-way issues for utilities. Given that telecommunications companies and other utilities frequently place their lines in municipal public rights-of-way, and are taxed thereon, the sections of HB 209 which relate specifically to the relocation of utility lines certainly relate to telecommunications companies. Even if the portions of HB 209 that relate to the relocation of utility lines (now codified as sections 227.551 through 227.559) run afoul of the single purpose, clear title rules, such a hypothetical proposition, if tested, would be an issue that concerns the constitutionality of the other provisions

Relators claim that the presence of two severability clauses in HB 209 implies that any portions not covered by those clauses must not be severed. (Brief of Relators at 34-35). However, this misstates the contents of the bill. HB 209 contains one severability clause (severing section 71.675 from sections 92.074 to 92.092, codified at section 92.098) and one non-severability clause (binding sections 92.074 to 92.089 together if any is adjudged unconstitutional, codified at section 92.092). Faced with one severability clause and one non-severability clause, it is impossible to determine the General Assembly's intent regarding the severability of section 71.675 and the portions of HB 209 which were codified in chapter 227 of the Missouri Revised Statutes. Instead, the rules above dictate that if HB 209 is found to violate the single purpose/clear title rule, section 71.675 falls under the single purpose and clear title and, therefore, should be severed and maintained.

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of HB 209, rather than section 71.675 which rests comfortably within the title and purpose of the bill.

F. Relators' Disagreement With Section 71.675 Should Be Resolved By The General Assembly, Which Has Broad Powers To Regulate Political Subdivisions, Not This Court.

1. The State Has Broad Powers To Regulate Itself.

In considering the constitutionality of section 71.675, it is important to emphasize the source and target of the legislation. Because cities and towns are political subdivisions of the State of Missouri that exclusively derive their existence and authority from the State's own sovereign power, the General Assembly – not the cities and town themselves – will always be the more appropriate decision-maker about when and whether to limit the ability of political subdivisions to file lawsuits in a representative capacity on behalf of other political subdivisions of the State. Municipal corporations, including cities, are extensions and subdivisions of the State. *Amos v. City of Noel*, 276 S.W.3d 355, 356 n.2 (Mo. App. S.D. 2009); *State v. Rotter*, 958 S.W.2d 59, 63 (Mo. App. W.D. 1997); *Sutton v. Fox Mo. Theatre Co.*, 336 S.W.2d 85, 92 (Mo. 1960) (stating, "A municipality . . . derives its governmental powers from the state rather than from the federal government and exercises generally only such governmental functions as are expressly or impliedly granted it by the state."). Therefore, section 71.675 represents the State imposing substantive standing and capacity to sue limits *on itself,* which it has every right to do.

The State has broad power over cities and towns, limited only by the constitution. *In re City of Kinloch*, 242 S.W.2d 59, 62 (Mo. 1951); *State ex rel. Behrens v. Crismon*, 188 S.W.2d 937, 939 (Mo. banc 1945). Even the most autonomous cities can be limited by statute. *City of Springfield v. Belt*, 307 S.W.3d 649, 653 n.10 (Mo. banc 2010). Section 71.675 represents one of the many limits that the state has chosen to impose upon itself through its political subdivisions.

2. Relators' Remedy Is To Seek To Change The Law With The General Assembly, Not Ask This Court To Rewrite It.

It is also important to emphasize that even when courts strongly disagree with the policy implications of Missouri statutes, they are not allowed to rewrite them. *See generally Brooks v. City of Sugar Creek*, 340 S.W.3d 201, 207 (Mo. App. W.D. 2011); *Marshall v. Marshall Farms, Inc.*, 332 S.W.3d 121, 128 (Mo. App. S.D. 2010) (holding that although it would be desirable "to extend applications of section 454.932 to include all payors . . . [the court] cannot usurp the function of the General Assembly, or by construction, rewrite its acts."). This is exactly what Relators ask. In fact, their brief identifies what they consider the pitfalls of Section 71.675. (Brief at 26.)

But "[i]t is not the Court's province to question the wisdom, social desirability or economic policy underlying a statute as these are matters for the

legislature's determination." *Batek v. Curators of Univ. of Mo.*, 920 S.W.2d 895, 899 (Mo. banc 1996) (internal quotations omitted). Only the General Assembly has the prerogative to determine the policy goals behind its statutes. *CACV of Colorado, LLC v. Muhlhausen*, No. SD 30272, 2011 WL 287976, at *3 (Mo. App. S.D. Jan 27, 2011) (holding that "[a]lthough the procedure for confirming an arbitration award may be unfair to Missouri consumers, Appellant's argument may be more aptly addressed by the General Assembly."); *Miles v. Lear Corp.*, 259 S.W.3d 64, 69 (Mo. App. E.D. 2008) (holding that "any unintended consequences [of a statute] are best resolved by the legislature, not the judiciary.").

Missouri courts have not been hesitant to enforce statutes under the General Assembly's regulation of municipal subdivisions powers, even when a decision had a much broader impact than a ruling on this issue possibly could. *E.g. State ex rel. City of Ellisville v. St. Louis County Bd. of Election Comm'rs*, 877 S.W.2d 620, 623 (Mo. banc 1994) (overturned by 1995 SJR 4) (holding that Missouri statutes that treated some first class counties differently than others were unconstitutional). While Winchester may argue that section 71.675 is unwise policy (and it is not), Missouri courts are not allowed to second guess the policy choices of the General Assembly.

III. CONCLUSION

Relators' attempt to have section 71.675 declared unconstitutional should be rejected. Each of their arguments fails to meet the high burdens required to declare a statute unconstitutional. Section 71.675 is a substantive statute addressing the issue of standing to serve as a class representative and is not in conflict with a procedural Supreme Court Rule. Additionally, section 71.675, which regulates all cities and towns, is not an impermissible special law. Section 71.675 also passes the single purpose/clear title rule. If Relators oppose the enforcement of section 71.675, their proper remedy is to move the General Assembly to change the law, not attempt to have this Court declare it unconstitutional on unfounded theories. Therefore, Respondent respectfully requests that this court deny Winchester's petition, dissolve the preliminary writ, and grant Respondent any other relief deemed necessary.

Dated: August 22, 2011

Respectfully submitted,

BERRY & MAXSON LLC
Robert P. Berry, # 46236
Jessica W. Kennedy, #46535
David C. Baxter, # 62165
16150 Main Circle Drive, Suite 120
Saint Louis, Missouri 63017
Telephone: (314) 480-5881
Facsimile: (314) 480-5884

Attorneys for Defendants Charter Communications, Inc., Charter Communications, LLC, and Charter Fiberlink - Missouri, LLC

IN THE SUPREME COURT
STATE OF MISSOURI

No. SC91631

STATE OF MISSOURI *ex rel.* COLLECTOR OF WINCHESTER, MISSOURI; and CITY OF WINCHESTER, MISSOURI;	)	Eastern District Court of Appeals No. ED96327
Relators,	)	
v.	)	
THE HON. MICHAEL T. JAMISON, Circuit Judge of St. Louis County,	)	St. Louis County Circuit Court No. 10SL-CC02719
Respondent.	)	

CERTIFICATE OF COMPLIANCE

Respondent, The Honorable Michael T. Jamison, Circuit Judge of St. Louis County, State of Missouri, hereby certifies that he has filed an original and nine copies of the Respondent's Brief in Opposition, together with a CD-ROM (without appendix), in the Missouri Supreme Court, and served two copies of the Brief, including CD-ROM (without appendix), on counsel of record, the trial court, and the Attorney General of Missouri.

The Respondent's Brief in Opposition is on paper of size 8 ½ x 11 inches, weighing not less than nine pounds to the ream, typed on one side, with margins of

not less than one inch, consecutively numbered, double-spaced (except for the caption, signature block, and certificate of service), securely bound on the left, and uses characters that are not smaller than 14 point. It has been prepared in a proportionally spaced typeface using Microsoft Word 2007. The number of words in the Brief is 10,519. The original has been signed by Robert P. Berry, one of the attorneys for Respondent.

All materials in the CD-ROM, which do not include the appendix, have been scanned using Malware, and the CD-ROM is virus-free.

Respectfully submitted,

BERRY & MAXSON LLC
Robert P. Berry, # 46236
Jessica W. Kennedy, #46535
David C. Baxter, # 62165
16150 Main Circle Drive, Suite 120
Saint Louis, Missouri 63017
Telephone: (314) 480-5881
Facsimile: (314) 480-5884

Attorneys for Defendants Charter Communications, Inc., Charter Communications, LLC, and Charter Fiberlink - Missouri, LLC

CERTIFICATE OF SERVICE

I hereby certify that two true and accurate copies of Respondent's Brief in Opposition, and a CD-ROM, has been sent via U.S. mail on this 22nd day of August, 2011, to the following:

The Honorable Michael T. Jamison
Circuit Judge of St. Louis County
St. Louis County Courthouse
7900 Carondelet Ave.
Clayton, MO 63105
Respondent

John W. Hoffman
Douglas R. Sprong
Korein Tillery, LLC
505 N. 7th St., Suite 3600
St. Louis, MO 63101
Attorneys for Collector of Winchester and City of Winchester

John F. Mulligan, Jr.
1600 South Hanley, Suite 101
Richmond Heights, MO 63144
Attorney for Collector of Winchester and City of Winchester

Howard Paperner
9322 Manchester Road
St. Louis, MO 53119
Attorney for Collector of Winchester and City of Winchester

Cynthia L. Hoemann
Associate County Counselor
41 South Central Ave.
Clayton, MO 63105
Attorney for St. Louis County, Missouri

James H. White
Special Assistant County Counselor
953 Alanson Dr.
St. Louis, MO 63132
Attorney for St. Louis County, Missouri

Missouri Attorney General's Office
Supreme Court Building
207 W. High St.
P.O. Box 899
Jefferson City, MO 65102