No. SC91631

IN THE SUPREME COURT OF MISSOURI
EN BANC

STATE OF MISSOURI ex rel. COLLECTOR OF WINCHESTER, MISSOURI; and CITY OF WINCHESTER, MISSOURI;	)	
On behalf of themselves and all others similarly situated,	)	Eastern District Court of Appeals No. ED96327
Relators,	)	St. Louis County Circuit Court No. 10SL-CC02719
v.	)	Honorable Michael T. Jamison, Judge Presiding
THE HONORABLE MICHAEL T. JAMISON, Circuit Judge of St. Louis County,	)	
Respondent.	)	

ON A PRELIMINARY WRIT OF PROHIBITION FROM THE SUPREME COURT OF MISSOURI, EN BANC, TO THE HON. MICHAEL T. JAMISON, CIRCUIT JUDGE OF ST. LOUIS COUNTY, TWENTY-FIRST JUDICIAL CIRCUIT, STATE OF MISSOURI

BRIEF OF RELATORS

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I. JURISDICTIONAL STATEMENT

Relators are plaintiffs in the civil matter of *Collector of Winchester, Missouri, et al. v. Charter Communications, Inc., et al.*, cause no. 10SL-CC02719, now pending in the St. Louis County Circuit Court. Respondent is The Honorable Michael T. Jamison, Circuit Judge of the St. Louis County Circuit Court. On February 17, 2011, Respondent entered an order sustaining Defendants' motion to strike/dismiss Winchester's class action claims pursuant to § 71.675.1.[1] On May 31, 2011, this Court issued a preliminary writ to show cause why a writ of prohibition should not issue prohibiting Respondent from doing anything other than vacating his February 17 order. Relators pray for entry of a final judgment in prohibition or, in the alternative, mandamus.[2] Relators invoke this Court's power to grant a remedial writ directed at the circuit court under art. V, § 4.1 of the Missouri Constitution.

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[1] Unless otherwise indicated, all statutory references are to the Revised Statutes of Missouri presently in effect.

[2] The requirements for issuance of an original remedial writ are discussed in Winchester's Petition for a Writ of Prohibition or, in the alternative, for a Writ of Mandamus. They are not repeated herein, because they are part of the record. Rule 84.24(g).

II. STATEMENT OF FACTS

This is an action by Winchester, on behalf of similarly-situated municipalities, to collect business license taxes from Charter Fiberlink – Missouri, LLC, a telephone service provider, and related entities ("Charter"). (Ex. 001-205.)[3]

Although Charter pays taxes pursuant to Winchester's (and other cities') ordinances, Winchester alleges that it does not pay the required taxes on gross receipts derived from exchange access, interexchange access, special access, interconnection facilities and equipment for use, toll or long-distance, reciprocal compensation arrangements, Federal Universal Service Fund surcharges, State Universal Service Fund surcharges, end user common line charges, intrastate telephone services, and other sources. (Ex. 009.) Thus, Charter allegedly pays less in taxes than it actually owes. (Id.) Winchester seeks, *inter alia*, a declaration that its (and other cities') ordinances apply to the foregoing receipts and an injunction requiring Charter to pay taxes on these receipts. (Ex. 010-011.)

On October 18, 2010, Charter moved to strike and dismiss Winchester's class claims pursuant to § 71.675.1, which provides, in relevant part, that "no city or town shall bring any action in federal or state court in this state as a representative member of a class

[3] All exhibit references are to the exhibits accompanying Winchester's Petition; they are part of the record. Rule 84.24(g).

to enforce or collect any business license tax imposed on a telecommunications company." (Ex. 220-226.)

Winchester opposed Charter's motion on three grounds. First, Winchester maintained that granting Charter's motion would violate art. V, § 5 of the Missouri Constitution, which provides that this Court "may establish rules relating to practice, procedure and pleading for all courts and administrative tribunals, which shall have the force and effect of law." Rule 41.02 provides that "Rules 41 to 101… supersede all statutes and existing court rules inconsistent therewith." Because § 71.675 purports to prevent cities from exercising the procedural right to participate in class actions against the telecommunications industry, it impermissibly conflicts with Rule 52.08, which provides, in relevant part, that "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all," and that any "action may be maintained as a class action" so long as certain prerequisites are met. Rule 52.08(a) and (b). (Ex. 227-350.)

Second, Winchester argued that § 71.675 violates the constitutional prohibition against local or special laws (Mo. Const. art. III, § 40), because it draws illegal distinctions between naturally related taxpayers, utilities, and political subdivisions. Third, Winchester argued that House Bill No. 209, which includes § 71.675, violates Mo. Const. art. III, § 23, because it contains more than one subject and the amendments to the State Highway Utility Relocation Act are not clearly expressed in the bill's title. (Ex. 227-350.) A notice of constitutional question was timely served upon the Attorney General of Missouri on November 17, 2010. (Ex. 351-353.)

Respondent heard oral arguments on these issues on December 3, 2010, and granted Charter's motion to strike and dismiss Winchester's class claims on February 17, 2011. (Ex. 367-371.)

On February 28, 2011, Relators timely petitioned for leave to appeal from Respondent's order pursuant to Rules 52.08(f) and 84.035, and § 512.020(3). On March 7, 2011, the Court of Appeals, Eastern District, denied Relators' petition, stating: the Court DENIES Petitioners' appeal from an Order Dismissing Class Action Certification. (Ex. 372.) On May 31, 2011, this Court issued a preliminary writ to show cause why a writ of prohibition should not issue prohibiting Respondent from doing anything other than vacating his February 17 order.

III. POINTS RELIED ON

A. Relators are entitled to a writ vacating Respondent's order of February 17, 2011, and prohibiting Respondent from striking/dismissing their class action claims pursuant to § 71.675.1, because § 71.675 contravenes art. V, § 5 of the Missouri Constitution and Rule 41.02, in that it purports to prevent cities from exercising the procedural right to participate in class actions against the telecommunications industry.

State ex rel. K.C. v. Gant, 661 S.W.2d 483 (Mo. banc 1983)

Reichert v. Lynch, 651 S.W.2d 141 (Mo. banc 1983)

State ex rel. Union Elec. Co. v. Barnes, 893 S.W.2d 804 (Mo. banc 1995)

State ex rel. Missouri Public Defender Comm. v. Pratte, 298 S.W.3d 870 (Mo. banc 2009)

Mo. Const. art. V, § 5

Rule 41.02

B. Relators are entitled to a writ vacating Respondent's order of February 17, 2011, and prohibiting Respondent from striking/dismissing their class action claims pursuant to § 71.675.1, because § 71.675 violates the constitutional prohibition against local or special laws (Mo. Const. art. III, § 40), in that it draws illegal distinctions between naturally related taxpayers, utilities, and political subdivisions.

Reals v. Courson, 164 S.W.2d 306 (Mo. 1942)

Planned Ind. Expansion Authority v. Southwestern Bell Tel. Co., 612 S.W.2d 772 (Mo. banc 1981)

McKaig v. Kansas City, 256 S.W.2d 815 (Mo. banc 1953)

Wilson v. City of Waynesville, 615 S.W.2d 640 (Mo.App.S.D. 1981)

Mo. Const. art. III, § 40

C. Relators are entitled to a writ vacating Respondent's order of February 17, 2011, and prohibiting Respondent from striking/dismissing their class action claims pursuant to § 71.675.1, because House Bill No. 209, which includes § 71.675, violates Mo. Const. art. III, § 23, in that it contains more than one subject and the amendments to the State Highway Utility Relocation Act are not clearly expressed in the bill's title.

Hammerschmidt v. Boone County, 877 S.W.2d 98 (Mo. banc 1994)

SSM Cardinal Glennon Children's Hosp. v. State, 68 S.W.3d 412 (Mo. banc 2002)

Carmack v. Director, Missouri Dept. of Agriculture, 945 S.W.2d 956 (Mo. banc 1997)

Murray v. Missouri Highway and Transp. Com'n, 37 S.W.3d 228 (Mo. banc 2001)

Mo. Const. art. III, § 23

IV. ARGUMENT

A. Relators are entitled to a writ vacating Respondent's order of February 17, 2011, and prohibiting Respondent from striking/dismissing their class action claims pursuant to § 71.675.1, because § 71.675 contravenes art. V, § 5 of the Missouri Constitution and Rule 41.02, in that it purports to prevent cities from exercising the procedural right to participate in class actions against the telecommunications industry.

Applicable standard of review: "The interpretation of a statute is a question of law, and appellate review is *de novo*." *Nelson v. Crane*, 187 S.W.3d 868, 869 (Mo. banc 2006). Similarly, the "standard of review for constitutional challenges to a statute is *de novo*." *Franklin County ex rel. Parks v. Franklin County Com'n*, 269 S.W.3d 26, 30 (Mo. banc 2008).

On February 17, 2011, Respondent entered an order sustaining Defendants' motion to strike/dismiss Winchester's class action claims pursuant to § 71.675.1. Respondent rejected Winchester's arguments that (i) House Bill No. 209 is not limited to

the purpose of amending Rule 52.08 and therefore violates art. V, § 5 of the Missouri Constitution, and (ii) Rule 52.08 is inconsistent with § 71.675 and therefore supersedes the statute under Rule 41.02. Respondent erroneously declared that there is no conflict between § 71.675 and Rule 52.08, because "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 governing the maintenance of class actions is a rule relating to practice or procedure, which has the force and effect of law. It was promulgated pursuant to authority granted the Supreme Court by art. 5, § 5 of the Missouri Constitution. Rule 41.02. The aim of the Rules of Civil Procedure, including Rule 52.08, is to secure a "just, speedy and inexpensive determination of *every action*." Rule 41.03 (emphasis added). "Uniformity in procedure cannot be attained by permitting divergent practices in different cases." *Stacy v. Dept. of Public Health and Welfare*, 468 S.W.2d 651, 654 (Mo.App. 1971). "When properly adopted, the rules of court are binding on courts, litigants, and counsel, and it is the court's duty to enforce them." *Sitelines, LLC v. Pentstar Corp.*, 213 S.W.3d 703, 707 (Mo.App.E.D. 2007).

Rule 52.08 provides, in relevant part, that "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all," and that "[a]n action may be maintained as a class action" so long as certain requirements are met. Rule 52.08(a) and (b). Rule 52.08 enables a state court to adjudicate claims of multiple parties at once, instead of in separate suits. It leaves the parties' legal rights and duties intact and the rules of decision unchanged.

Rule 52.08 applies generally. It unambiguously authorizes any plaintiff, in any state civil proceeding, to maintain a class action if the Rule's requirements are met. If it did not, the statutory exceptions in § 71.675 would be unnecessary. Section 71.675.1 provides:

> Notwithstanding any other provision of law to the contrary, no 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. A city or town may, individually or as a single plaintiff in a multiple-plaintiff lawsuit, bring an action in federal or state court in this state to enforce or collect any business license tax imposed on a telecommunications company.

Section 71.675 purports to amend or annul Rule 52.08, in part, by restricting its broad application.[4] Whereas before passage of § 71.675 a municipality could avail itself

[4] Webster's defines "amend" as "to alter, modify, rephrase, or add to or subtract from (a motion, bill, constitution, etc.) by formal procedure: *Congress may amend the proposed tax bill*." "Amend," Def. 1, Random House Webster's Unabridged Dictionary, 2nd ed., 2001 (emphasis in original). It defines "alter" as "*to make different in some particular*…" and "*to change*; become different or modified." "Alter," Defs. 1 and 3, Random House Webster's Unabridged Dictionary, 2nd ed., 2001 (emphasis added). It defines "modify" as "to change somewhat the form or qualities of; alter partially" and "to reduce or lessen in degree or extent." "Modify," Defs. 1 and 5, Random House

of Rule 52.08 to maintain a class action for the collection of telephone business license taxes, after passage of § 71.675 it cannot. Thus, the first sentence of Rule 52.08(a) has been modified, such that one or more members of a class may *not* sue as representative parties if the action is brought by a city or town to enforce or collect a business license tax imposed on a telecommunications company. And the first sentence of Rule 52.08(b) has been altered, such that an action may *not* be maintained as a class action if the action is brought by a city or town in these circumstances. Charter's assertion that "the statute articulates a new and *different standard* about which potential class representatives can actually serve as class representatives under Rule 52.08" plainly acknowledges the amendatory effect of § 71.675. *See* Suggestions in Opposition to Petition for a Writ of Prohibition or, in the alternative, for a Writ of Mandamus at p. 24 (emphasis added).

The General Assembly's amendment of Rule 52.08 is a nullity, however, because it contravenes art. V, § 5 of the Missouri Constitution. This Court's rules of practice, procedure and pleading may only be "annulled or amended in whole or in part by a law" enacted solely for that purpose. Mo. Const. art. V, § 5; *State v. Reese*, 920 S.W.2d 94, 95 (Mo. banc. 1996). In addition, the law "must refer expressly to the rule" to be effective.

Webster's Unabridged Dictionary, 2nd ed., 2001. It defines "annul" as "(esp. of laws or other established rules, usages, etc.) to make void or null; abolish; cancel; invalidate: *to annul a marriage*." "Annul," Def. 1, Random House Webster's Unabridged Dictionary, 2nd ed., 2001 (emphasis in original).

State ex rel. K.C. v. Gant, 661 S.W.2d 483, 485 (Mo. banc 1983). As this Court remarked:

> The constitutional prescription of the manner in which the General Assembly must act is of pristine importance. It is essential that the bench, the bar, and the public be clearly advised as to the procedural rules that are actually in effect at a given time. The rules are compiled and published, officially and privately, so all may read. There would be substantial problems if concerned persons could not rely on a rule of court duly enacted and not expressly repealed or modified. That is why the Constitution specifies the formalities which the General Assembly must follow in order to annul or amend a rule. A law, to qualify as one "limited to the purpose" of amending or annulling a rule, must refer expressly to the rule.…(Citation omitted.)…*Nothing less will suffice.*

Gant, 661 S.W.2d at 485 (emphasis added).

Section 71.675 fails on both counts. First, House Bill No. 209 was not enacted solely for the purpose of amending Rule 52.08. House Bill No. 209 prohibits "all but a few municipalities from enforcing their business license taxes for wireless service provided by telecommunications companies prior to July 1, 2006, requires them to dismiss suits that have been filed to collect such taxes, and prohibits them from suing for such taxes prior to July 1, 2006, while giving immunity from suit for such taxes to any telecommunications company that acted in subjective good faith in failing to pay these taxes prior to July 1, 2006." *City of Springfield v. Sprint Spectrum, L.P.*, 203 S.W.3d 177, 181 (Mo. banc 2006) (discussing § 92.089 and other provisions). House Bill No.

209 "also enacted section 71.675, which prospectively prohibits cities and towns from filing class action suits against telecommunications companies to recover business license taxes." *Id.*, at 180 n. 5. Further, House Bill No. 209 "included modifications to sections 227.241 to 227.249, the 'State Highway Utility Relocation Act,' setting out rules for relocating utilities along highways." *Id.* A multi-faceted bill, like House Bill No. 209, in no way qualifies as "a law limited to the purpose" of amending or annulling Rule 52.08.[5]

[5] The Court made this point before in the context of a challenge to § 545.880.1:

> While appellant's lack of standing precludes reaching the merits of his challenge to § 545.880.1, under Mo. Const. art. V, § 5, the legislature may consider it prudent to review its practice of enacting a bill such as House Committee Substitute for Senate Committee Substitute for Senate Bill No. 602 when it seeks to annul a provision of our rules. Section 545.880.1 was a subpart of one of nine discrete provisions in § 1 of Senate Bill 602. A *multi-faceted* law such as Senate Bill 602 which is not limited to the *singular objective* of annulling one of our rules may very well, under a logical extension of our decision in *State ex rel. K.C. v. Gant,* 661 S.W.2d 483 (Mo. banc 1983), run afoul of the "limited to the purpose" mandate of Article V, § 5. *See also, Miller v. Russell,* 593 S.W.2d 598, 604 (Mo.App. 1979) (statute which provided for revisions in court structure as well as annulling a Rule held violative of art. V, § 5).

State v. Pizzella, 723 S.W.2d 384, 387 n. 3 (Mo. banc 1987) (emphasis in original).

Second, neither House Bill No. 209 nor § 71.675 expressly refer to Rule 52.08 as required. The closest § 71.675 gets is the first clause, which reads "Notwithstanding any other provision of law to the contrary…" This is too general to qualify as an express reference to Rule 52.08. The General Assembly knows how to single-out rules for legislative treatment, *see* §§ 210.847.3 ("The provisions of Missouri supreme court rule 88.01 shall not apply when…"), 452.311, 545.140.1, 545.140.2, 545.880.1, etc., but it chose not to do so in this instance. Because the purported amendment fails to satisfy the requirements of Mo. Const. art. V, § 5 and *Gant*, Rule 52.08 controls in its present form.

Separately, § 71.675 implicates the supersession clause in Rule 41.02, because Rule 52.08 and § 71.675 are "inconsistent."[6] "[R]ules promulgated pursuant to article V, § 5 'supersede all statutes and existing court rules inconsistent therewith,' Rule 41.02; if

[6] Although courts often conflate Mo. Const. art. V, § 5 and Rule 41.02, the provisions are operationally distinct. Mo. Const. art. V, § 5 contains a "limited to the purpose" mandate not found in Rule 41.02. Rule 41.02 concerns itself with inconsistency, which is foreign to Mo. Const. art. V, § 5. Once adopted, a procedural rule, like Rule 52.08, controls unless it is specifically annulled or amended by the legislature in conformity with Mo. Const. art. V, § 5. *Reese*, 920 S.W.2d at 95 ("Because Rule 52.13(a)(1) is procedural, it controls this case unless specifically annulled or amended by the legislature."). It does not matter whether the statute is consistent or inconsistent with the rule, only whether the statute has been annulled in whole or in part. If a procedural rule is improperly amended, the Constitution is violated and the rule prevails irrespective of Rule 41.02.

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). Webster's defines "inconsistent" as "lacking agreement, as one thing with another or two or more things in relation to each other; at variance." "Inconsistent," Def. 2, Random House Webster's Unabridged Dictionary, 2nd ed., 2001. It defines "variance" as "the state, quality, or fact of being variable, *divergent*, *different*, or anomalous." "Variance," Def. 1, Random House Webster's Unabridged Dictionary, 2nd ed., 2001 (emphasis added).

There is little doubt that Rule 52.08 and § 71.675 are "different" and "divergent" and therefore "inconsistent" within the meaning of Rule 41.02. The treatment of municipalities suing to recover telephone business license taxes is not the same before and after § 71.675. After § 71.675, 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. And Rule 52.08(b) still provides that an action may be maintained as a class action, unless the action involves efforts by a city or town to collect telephone business license taxes. These are differences in Rule 52.08 that did not exist prior to § 71.675.

Inconsistency has been found where, as here, a rule permits a party to take certain action but a statute purports to eliminate the practice or procedure, and *vice versa*. *See Reichert v. Lynch*, 651 S.W.2d 141, 143 (Mo. banc 1983) (rule permitting party to move for judgment notwithstanding the verdict was inconsistent with statute abolishing the practice within meaning of Rule 41.02); *Huston v. State*, 272 S.W.3d 420, 421

(Mo.App.E.D. 2008) (rule abolishing writs of *coram nobis* was inconsistent with statute permitting writs of error upon final judgment).

Inconsistency also has been found where a rule, like Rule 52.08, purports to give a trial court discretion but a statute, like § 71.675 (removing a certain class of cases from trial court's consideration under Rule 52.08), takes it away, and *vice versa*. *See S.J.V. v. Voshage*, 860 S.W.2d 802, 804 (Mo.App.E.D. 1993) (statute leaving choice of whether to appoint next friend in cases under Uniform Parentage Act within the discretion of the trial court was inconsistent with rule providing that civil actions may be commenced and prosecuted only by duly appointed guardian or next friend within meaning of Rule 41.02); *State ex rel. McCulloch v. Lasky*, 867 S.W.2d 697, 699 (Mo.App.E.D. 1993) (postconviction rule giving court discretion to determine whether movant may be present at evidentiary hearing supersedes statute prohibiting any person detained in correctional facility from attending civil proceeding), *overruled on other grounds*, *State ex rel. Polytech, Inc. v. Voorhees*, 895 S.W.2d 13 (Mo. banc 1995); *Heistand v. State*, 740 S.W.2d 282, 284 (Mo.App.S.D. 1987) (there is a "patent inconsistency" between a mandatory statute requiring a presentence investigation and report in all felony cases when a probation officer is available, unless such investigation is waived by the defendant, and a discretionary rule requiring a presentence investigation and report when a probation officer is available, unless otherwise directed by the court); *State v. Propher*, 619 S.W.2d 83, 91 (Mo.App.W.D. 1981) (same); *State v. Clark*, 723 S.W.2d 17, 19-20 (Mo.App.E.D. 1986) (same in the context of Rule 25 and § 577.020.6); *see also State ex*

rel. Helms v. Moore, 694 S.W.2d 502, 504 (Mo.App.S.D. 1985); *State v. Tate*, 658 S.W.2d 940, 947 (Mo.App.E.D. 1983).

Inconsistency also has been found where, as here, a statute imposes terms that are qualitatively different than a rule's. *See Manzella v. Gilbert-Magill Co.*, 965 S.W.2d 221, 224 (Mo.App.W.D. 1998) (rule permitting appellant to request transcript of proceedings within 30 days after notice of appeal was inconsistent with statute requiring payment of all charges for preparation of transcript within 10 days of filing of notice of appeal within meaning of Rule 41.02); *Ostermueller v. Potter*, 868 S.W.2d 110, 111 (Mo. banc 1993) (statute that defined the commencement of a civil action as "[t]he filing of a petition in a court of record,…and suing out of process therein" was contradicted by rule that did not include "suing out of process" language); *Ridgeway v. Asibem, Inc.*, 810 S.W.2d 352, 353-54 (Mo.App.W.D. 1991) (statute mandating that a suit be filed only in the "proper court" conflicted with rule repealing the phrase "proper court"); *Salenia A.B. v. Air National Aircraft*, 712 S.W.2d 386, 389 (Mo.App.W.D. 1986) (statute and rule were inconsistent within meaning of Rule 41.02, where rule did not adopt the statutory exception to the bond requirement "in cases where the defendant is not a resident of the state of Missouri"); *Miller v. Russell*, 593 S.W.2d 598, 603-04 (Mo.App.W.D. 1979) (statutory enactment that exempted fathers of illegitimate children from definition of "parent" conflicted with rule eliminating reference to legitimacy of birth).

Charter argues, and Respondent found, that there is no conflict between Rule 52.08 and § 71.675, "because section 71.675 addresses the substantive issue of standing." Answer/Return to Preliminary Writ of Prohibition at p. 17. This is error for several

reasons. First, the character of the challenged statute as procedural or substantive is irrelevant. Article V, § 5 of the Missouri Constitution permits the Supreme Court to establish rules relating to practice, procedure and pleading, but the rules shall not change substantive rights. Rule 52.08 satisfies these conditions. Article V, § 5 is violated when Rule 52.08 is amended or annulled, in whole or in part, by the enactment of a law not limited to the purpose; Rule 41.02 supersedes "all statutes" inconsistent with Rule 52.08. Neither provision distinguishes between substantive or procedural statutes. What matters is what the rule itself regulates. If it governs the manner and means by which litigants' rights are enforced, it is valid and controlling. If it alters substantive rights, it is not. Any statement to the contrary, which purports to premise a rule of decision upon the procedural or substantive character of the challenged statute, is unsupported by the plain language of Rule 41.02 and Mo. Const. art. 5, § 5.

Second, § 71.675 is unquestionably a law "relating" to "practice" or "procedure," as those terms are understood in the context of Mo. Const. art. 5, § 5. *See State ex rel. Union Elec. Co. v. Barnes*, 893 S.W.2d 804, 805 (Mo. banc 1995) ("Procedural laws prescribe a method for enforcing rights or obtaining redress for their invasion… Substantive laws, on the other hand, define and regulate those rights. In a sense, substantive laws create rights; procedural laws provide remedies."). Section 71.675 neither changes plaintiffs' separate entitlements to relief nor abridges defendants' rights; it alters only how certain claims are processed. The first sentence of § 71.675 regulates practice in suits by cities to collect telephone business license taxes. The second sentence permits joinder of individual municipalities in a multi-plaintiff lawsuit, which is a classic

procedural device. *See* Rule 52.05. The word "enforce" appears in every sentence of § 71.675 and, although not controlling, the heading affixed to § 71.675 by the compiler of statutes reads "Enforcement." Section 71.675 does not "create the right to a judgment" (*Barnes*) or "create, destroy or modify anyone's primary rights" (*Peabody Coal*), but rather it "prescribes the method to carry on [a] suit" (*Reese*). It therefore relates to practice or procedure.[7]

Third, Charter's understanding of the term "conflict" is contrary to established precedent. In Missouri, the test for determining whether a conflict exists is whether one law prohibits what another law permits. *State ex rel. Ashcroft v. City of Fulton*, 642 S.W.2d 617, 620 (Mo. banc 1982) (analyzing two constitutional amendments). Thus, a statute prohibiting credit against permanent partial disability benefits conflicts with a prior statute permitting an employer to claim credit for wages to reduce a workers'

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[7] *See also State ex rel. K.C. v. Gant*, 661 S.W.2d at 485:

> The respondent asserts that § 211.029 is "substantive" rather than "procedural," and that it is therefore beyond the reach of the Court's rule making power. We reject the assertion. The statute, both before and after the amendment, deals with the means by which the parties may assert their underlying rights as to custody, adoption, and other matters within the jurisdiction of the Juvenile Court, and does not define the nature or the extent of the underlying rights. The rule, furthermore, affords a hearing rather than denying one. It certainly abridges no substantive right.

compensation recovery. *Morrow v. City of Kansas City*, 788 S.W.2d 278, 281 (Mo. banc 1990). An ordinance prohibiting the sale of gasoline at self-service filling stations conflicts insofar as it prohibits "precisely what state regulation permits." *Page Western, Inc. v. Comm. Fire Prot. Dist. of St. Louis County*, 636 S.W.2d 65, 67-68 (Mo. banc. 1982). And an ordinance barring the use of an ambulance siren at certain times and in specific locations directly conflicts with a state statute vesting an ambulance driver with discretion to sound a siren. *St. Charles County Ambulance Dist. v. Town of Dardenne Prairie*, 39 S.W.3d 67, 69-70 (Mo.App.E.D. 2001). *See also Nat. Advertising Co. v. Missouri State Hwy and Transp. Comm.*, 862 S.W.2d 953, 955 (Mo.App.E.D. 1993); *Miller v. City of Manchester*, 834 S.W.2d 904, 907 (Mo.App.E.D. 1992).

Rule 52.08 and § 71.675 conflict in the same manner and to the same extent as the foregoing enactments. Rule 52.08(a), as a rule of general application, permits one or members of a municipal class to sue as representative parties; § 71.675 does not. Rule 52.08(b), as a rule of general application, permits class actions to enforce or collect license taxes; § 71.675 does not. This clearly meets the definition of "conflict," which is "to come into collision or disagreement; be contradictory, at variance, or in opposition; clash." "Conflict," Def. 1, Random House Webster's Unabridged Dictionary, 2nd ed., 2001. Charter willfully blinds itself to this understanding.

Fourth, § 71.675 does not address "standing" in any legal sense. Standing is a jurisdictional construct that concerns itself with the sufficiency of plaintiff's interest in the subject-matter of the suit. The standing inquiry focuses on whether the plaintiff is the proper party to bring the suit. *Raines v. Byrd*, 521 U.S. 811, 819, 117 S.Ct. 2312, 138

L.Ed.2d 849 (1997). "In an action for declaratory judgment or one of injunctive relief, the criteria for standing is whether the plaintiff has a legally protectable interest at stake." *Phillips v. Missouri Dept. of Social Services*, 723 S.W.2d 2, 4 (Mo. banc 1987). "A legally protectable interest contemplates a pecuniary or personal interest directly in issue or jeopardy which is subject to some consequential relief, immediate or prospective." *Id.*, *quoting Absher v. Cooper*, 495 S.W.2d 696, 698 (Mo.App. 1973). Lack of standing cannot be waived; it results in the court not having jurisdiction of the subject-matter. *Barker v. Danner*, 903 S.W.2d 950, 957 (Mo.App.W.D. 1995) ("[i]f a party is found to lack standing sufficient to maintain the action and, therefore, has no right to relief, the court necessarily does not have jurisdiction of the question presented and may not enter a judgment on that question for or against any of the parties").

In the present case, nobody – not Respondent, not Charter – is suggesting that Winchester lacks "standing," as properly understood, to bring the underlying suit. Winchester has pled harm as a result of Charter's failure to pay taxes and a right to relief. The trial court has jurisdiction of the subject-matter and of the questions presented. Section 71.675 does not alter this conclusion. It does not concern itself with subject-matter jurisdiction or bear upon Winchester's ability to bring suit. There is nothing in § 71.675 that implicates traditional notions of standing. It simply attempts to limit municipal access to procedural Rule 52.08.

Charter also argues that this Court's decision in *State ex rel. Missouri Public Defender Comm. v. Pratte*, 298 S.W.3d 870 (Mo. banc 2009), discussing the interplay between Rule 31.02(a) and § 600.021.2, is controlling. Charter characterizes the present

circumstance as "analytically identical." Suggestions in Opposition to Petition for a Writ of Prohibition or, in the alternative, for a Writ of Mandamus at p. 25. Rule 31.02(a) provides that "[u]pon a showing of indigency, it shall be the duty of the court to appoint counsel to represent [the defendant]," whereas § 600.021.2 provides that public defenders cannot engage in the practice of law except in their public capacity. The Court determined that the provisions are harmonious: "Section 600.021.2 mandates that public defenders cannot be appointed in their private capacity – as lawyers, they do not have private capacities. Rule 31.02(a) does not change this." *Pratte*, 298 S.W.3d at 886. Thus, before and after § 600.021.2, the Rule's directive that indigent defendants be appointed counsel remains unchanged; every indigent defendant gets appointed counsel. 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.

In contrast, before passage of § 71.675 a municipality could maintain a class action for the collection of telephone business license taxes, but after passage of § 71.675 it cannot. Rule 52.08 permitting class actions, regardless of character, is plainly different after § 71.675. There is no way to give Rule 52.08 its intended effect while at the same time enforcing § 71.675. This is made clear by earlier discussions in *Pratte*, which are more germane to the issue of conflict. For example, the Court found that a commission regulation denying representation to a certain category of persons who may be indigent, such as persons retaining private counsel during the pendency of case, impermissibly conflicts with a statute mandating that persons shall be considered eligible for court-

appointed representation if indigent. *Pratte*, 298 S.W.3d at 882-83. Similarly, a commission rule that, as applied, authorizes a public defender to decline categories of cases, such as probation revocation cases, directly contradicts a statute requiring the public defender's office to represent indigent defendants who are charged with violating probation. *Pratte*, 298 S.W.3d at 884-85. These examples from *Pratte* are more analogous to the situation presented by Rule 52.08 and § 71.675. *Pratte* advances Winchester's position; it does not detract from it.

B. Relators are entitled to a writ vacating Respondent's order of February 17, 2011, and prohibiting Respondent from striking/dismissing their class action claims pursuant to § 71.675.1, because § 71.675 violates the constitutional prohibition against local or special laws (Mo. Const. art. III, § 40), in that it draws illegal distinctions between naturally related taxpayers, utilities, and political subdivisions.

Applicable standard of review: "The interpretation of a statute is a question of law, and appellate review is *de novo*." *Nelson v. Crane*, 187 S.W.3d 868, 869 (Mo. banc 2006). Similarly, the "standard of review for constitutional challenges to a statute is *de novo*." *Franklin County ex rel. Parks v. Franklin County Com'n*, 269 S.W.3d 26, 30 (Mo. banc 2008).

Respondent rejected Winchester's argument that § 71.675 violates Mo. Const. art. III, § 40, because it draws illegal distinctions between naturally related taxpayers, utilities and political subdivisions. In upholding § 71.675, Respondent cited *City of Springfield* for the proposition that whether a law is special or general is "best determined 'by

looking to whether the categories created under the law are open-ended or fixed, based on some immutable characteristic,'" and "[h]ere, all cities and towns currently in existence as well as all cities and towns that come into existence in the future are equally impacted by section 71.675."

Respondent misquotes *City of Springfield*. The Court did not say that whether a law is special or general is "best determined" by looking to whether the categories created under the law are open-ended or fixed. It said that, when dealing with laws regarding taxation or powers of political subdivisions, 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 immutable characteristics. *City of Springfield*, 203 S.W.3d at 184. That some method is easy does not mean that it is the exclusive, or even the best, approach to take in all circumstances.[8]

Missouri jurisprudence recognizes two analytical approaches to special law issues. By these rules, a statute is unconstitutional special legislation if (1) it creates a totally arbitrary and unreasonable method of classification, *e.g.*, *Reals v. Courson*, 164 S.W.2d 306 (Mo. 1942), *or* (2) it creates a permanently closed class, *e.g.*, *Harris v. Missouri Gaming Com'n*, 869 S.W.2d 58 (Mo. banc 1994). The latter approach is most often used to evaluate legislation classifying political subdivisions.

Here, the challenged statute does more than classify political subdivisions. It affects the fairness and uniformity of the judicial process itself. And it is particular in the extreme. Section 71.675.1 prohibits representative actions in a narrow class of cases: it

[8] "The right way is not always the…easy way" – Margaret Chase Smith.

only pertains to certain plaintiffs (cities or towns), suing certain defendants (telecommunications companies), for certain relief (to enforce or collect any business license tax). Charter's facile analysis leads to the conclusion that since none of the categories are permanently closed, there can be no special law violation.

In contrast, *Reals* recognizes that "'[a] law may be general and yet affect only persons, things or localities of a particular class'[;]…the question is as to propriety of the classification resorted to by the legislature." *Reals*, 164 S.W.2d at 308. Though a law may purport to be general, if the classification is "unreasonable, unnatural or arbitrary so that it does not apply to all persons or things similarly situated, it is then, in fact, special despite its apparent purpose." *Id*. Thus, the "test of a special law is the appropriateness of its provisions to the objects that it excludes. It is not, therefore, what a law includes, that makes it special, but what it excludes." *Id*. Clever drafting does not transform an unreasonable classification, however open-ended, into a reasonable one. *Id*. ("If in fact the act…by its terms or 'in its practical operation…can only apply to particular persons or things of a class, then it will be a special or local law, however carefully its character may be concealed by form of words.'").[9]

[9] Charter maintains that the "test from *Reals v. Courson*, 164 S.W.2d 306, 307-08 (Mo. 1942), was considered and rejected by the Missouri Supreme Court in *City of Springfield v. Sprint Spectrum*, 203 S.W.3d 177 (Mo. banc 2006)." Answer/Return to Preliminary Writ of Prohibition at p. 20 n. 3. If so, the Court had a funny way of showing it because the Court cited *Reals*, including its "test," with approval at various junctures. *City of*

Courts have not hesitated to strike-down classifications that are irrational, are arbitrary, show favoritism or burden unfairly, even though arguably open-ended. In *Planned Ind. Expansion Authority v. Southwestern Bell Tel. Co.*, 612 S.W.2d 772 (Mo. banc 1981) (hereafter "*P.I.E.*"), the Court determined that a statutory amendment giving telephone utilities, but not other utilities, a vested property interest in public land under which conduits were placed violated the constitutional ban on local or special laws:

> Though not addressed by the parties, it is equally clear that the 1974 amendment is violative of the ban on local or special laws found in Art. III, s 40(28), of the Missouri Constitution….[T]he 1974 amendment confers a special privilege and benefit upon telecommunications companies vis-a-vis other utility companies whose customers might be served through the use of public streets and alleys… …[T]he 1974 amendment is partial in that it does not include and benefit all companies which distribute their services beneath the public ways. In *State v. Currency Services, Inc.*, 358 Mo. 983, 218 S.W.2d 600, 605 (1949), we said:
>
> > No person or class of persons can be excluded from that privilege while others are permitted to enjoy it, unless some reason exists for the distinction having a just relation to the object to be accomplished.
>
> There appears to be no reasonable constitutional basis for granting a permanent easement to a telecommunications company while not creating a similar vested

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Springfield, 203 S.W.3d at 184, at 185 n. 11. At no point did the Court indicate that the "test from *Reals*" was rejected or even come close to it.

easement for electric, water or other utility companies whose services might be provided through underground facilities.

P.I.E., 612 S.W.2d at 776-77. *See also Wilson v. City of Waynesville*, 615 S.W.2d 640, 645-46 (Mo.App.S.D. 1981) (ordinance which prohibited limousines, but not cabs or buses, from disembarking at any location but one was unreasonable and arbitrary and, thus, unenforceable as a special law); *McKaig v. Kansas City*, 256 S.W.2d 815, 817-18 (Mo. banc 1953) (city ordinance prohibiting automobile dealers from operating on Sundays and six national holidays, but not other merchants, was unconstitutional special law; there was no reasonable basis for such distinction); *City of Springfield v. Smith*, 19 S.W.2d 1, 6-7 (Mo. banc 1929).

Seeking to lessen *P.I.E.*'s impact, Charter notes that "this Court recognized in [*P.I.E.*] that the parties had not addressed the special law issue." Answer/Return to Preliminary Writ of Prohibition at p. 23 n. 4. This is true but Charter needs to do more than simply claim "*dicta*." The Court's remarks were not "by the way" statements; they were the product of a comprehensive analysis of a specific legal issue. Its opinion is akin to judicial *dictum*, not *obiter dictum*. *See American Country Ins. Co. v. Cline*, 722 N.E.2d 755, 762 (Ill.App.1st Dist. 1999) ("Judicial *dictum*, unlike *obiter dictum*, is generally entitled to weight and should be followed unless found to be erroneous."); *Chase v. American cartage* Co., 186 N.W. 598, 599 (Wis. 1922) ("[W]hen a court of last resort intentionally takes up, discusses, and decides a question germane to, though not necessarily decisive of, the controversy, such decision is not a dictum, but is a judicial act of the court which it will thereafter recognize as a binding decision."). That the Court

found it necessary to discuss Mo. Const. art. III, § 40, though not addressed by the parties, highlights the egregiousness of the classification in *P.I.E.* As if to emphasize the point, *P.I.E.*'s analysis and conclusion were cited with approval twenty-five years later in *City of Springfield*. *Id.*, 203 S.W.3d at 187.

Section 71.675 draws the same irrational distinctions between similarly-situated businesses and utilities found constitutionally wanting in *P.I.E.*, *City of Waynesville*, *McKaig* and *City of Springfield*. It purports to condition the manner of enforcement against some business license taxpayers but not others. It treats enforcement actions against telephone companies different from enforcement actions against other utilities and businesses. It affects cities and towns but not other political subdivisions. It abridges the procedural rights of plaintiffs, not defendants. It disproportionately burdens small cities with small claims. It permits divergent practices in similar cases (compare the treatment of cities suing to collect license taxes in § 71.675.1 with the treatment of taxpayers suing to enjoin collection in § 71.675.2).

Together with the Municipal Telecommunications Business License Tax Simplification Act, § 71.675 is a legislative give-away to the telecom industry, to the exclusion of other businesses subject to municipal taxes or facing class actions. Unlike electric companies, gas companies and retail chains, § 71.675 actually protects delinquent payers of telephone license taxes; it is they who can escape liability because a town, with limited resources and an even smaller claim, is unable to obtain class representation. The

Bill creates an uneven playing field, both in the courtroom and in the marketplace.[10] If successful, any industry experiencing difficulty could be made the beneficiary of special legislation designed to ameliorate its economic adversity by limiting victims' access to Rule 52.08.

Section 71.675's classifications are unquestionably "unreasonable, unnatural or arbitrary" within the meaning of *Reals*. In *P.I.E.*, it was "clear" that a law preferring telecommunications companies to other utilities was violative of the ban on local or special laws. *P.I.E.*, 612 S.W.2d at 776-77. There was nothing arguable about it. Not only is § 71.675 irrational, but Relators take issue with the notion that its classifications are open-ended; they are not. Section 71.675's categories are fixed because they only apply to particular persons or things *of* a class. For example, if the legislative

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[10] It has been said that class actions "create[] a potentially enormous aggregate recovery for plaintiffs, and thus an *in terrorem* effect on defendants, which may induce unfair settlements." *Parker v. Time Warner Ent. Co., L.P.*, 331 F.3d 13, 22 (2nd Cir. 2003). *See also Blair v. Equifax Check Services, Inc.*, 181 F.3d 832, 834 (7th Cir. 1999) ("[A] grant of class status can put considerable pressure on the defendant to settle, even when the plaintiff's probability of success on the merits is slight. Many corporate executives are unwilling to bet their company that they are in the right in big-stakes litigation, and a grant of class status can propel the stakes of a case into the stratosphere."). Do Ameren, Wal-Mart and other Missouri businesses not face the same judicial risks and economic concerns? Or are they unique to telecommunications companies?

classification is cities or towns, then it is permanently closed to other political subdivisions; if the legislative classification is telecommunications companies, then it is permanently closed to other utilities and businesses; if the legislative classification is actions to enforce or collect business license taxes, then it is permanently closed to other types of litigation. Judging § 71.675 by what it excludes, the law is patently "special" by its terms ("on its face") and in its practical operation. It arbitrarily regulates practice before courts, shows favoritism to one industry, impairs debt collection,[11] and disproportionately burdens municipalities. Mo. Const. art III, §§ 40(4), 40(21), 40(28) and 40(30).

"The unconstitutionality of a special law is presumed. The party defending the facially special statute must demonstrate a 'substantial justification' for the special treatment." *Tillis v. City of Branson*, 945 S.W.2d 447, 448-49 (Mo. banc 1997). Charter cannot sustain its heightened burden, because § 71.675 is unable to withstand even rational basis scrutiny. *See School Dist of Riverview Gardens v. St. Louis County*, 816 S.W.2d 219, 222 (Mo. banc 1991) (even a law founded on open-ended criteria will be declared unconstitutional "where the statutory classification is arbitrary and without a rational relationship to a legislative purpose").

There is no room for imagination or hypotheses about possible legislative purposes, because the General Assembly is quite clear in that regard: "The general

[11] *See* 9 McQuillin Mun. Corp. § 26:98 (3rd ed. October 2005) ("Generally, a city can maintain an action to collect license fees or taxes as a debt...").

assembly finds and declares it to be the policy of the state of Missouri that costly litigation which have or may be filed by Missouri municipalities against telecommunications companies, concerning the application of certain business license taxes to certain telecommunications companies, and to certain revenues of those telecommunications companies…is detrimental to the economic well being of the state…" § 92.089.1. Prohibiting class actions does not in any way advance the legislature's stated goal of reducing "costly litigation," which "[has been] or may be filed." On the contrary, it fosters costly litigation.

Class actions promote efficiency and cost savings by aggregating similar claims in a single proceeding, before a single judge, for the resolution of common issues. *See State ex rel. Union Planters Bank, N.A. v. Kendrick*, 142 S.W.3d 729, 735 (Mo. banc 2004) (recognizing that a class action "is designed to promote judicial economy by permitting the litigation of…common questions of law and fact of numerous individuals in a single proceeding"); Rule 41.03 (recognizing that the aim of Rule 52.08 and other rules is to secure a "just, speedy and inexpensive determination of every action").[12] There is no cost

[12] Class actions serve three essential purposes: (1) to facilitate judicial economy by the avoidance of multiple suits on the same subject matter, *American Pipe and Constr. Co. v. Utah*, 414 U.S. 538, 550, 94 S.Ct. 756, 764-65, 38 L.Ed.2d 713 (1974); (2) to provide a feasible means for asserting the rights of those who "would have no realistic day in court if a class action were not available," *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809, 105 S.Ct. 2965, 2973, 86 L.Ed.2d 628 (1985); and (3) to deter inconsistent results,

savings to plaintiffs, defendants or courts by replacing class actions with individual and multi-plaintiff lawsuits. Section 71.675 eliminates the gold standard for efficiency in favor of repetitious papers, motions and suits, which Rule 52.08 was designed to avoid.[13] A statutory classification that does not advance the law's stated goal, but actively undermines it, is not rational. *See Bell v. Hongisto*, 501 F.2d 346, 355 n. 12 (9th Cir. 1974) ("to determine whether a statute is rational, *the court must consider the statute's logical tendency to promote its avowed goals* against its tendency to impair other, more important goals") (emphasis added), *cert. denied*, 420 U.S. 962, 95 S.Ct. 1351, 43

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assuring a uniform, singular determination of rights and liabilities, *First Federal of Michigan v. Barrow*, 878 F.2d 912, 919 (6th Cir. 1989).

[13] *See also* Newberg on Class Actions § 1:6, Objectives of class actions (2002):

> Why do class actions exist? Historically, class actions were created in English courts of chancery as a matter of convenience, to afford partial justice to parties before the court when they were unable to join all interested parties pursuant to the then-compulsory joinder rule governing equity court procedures.[] This historical invention, born of convenience, continues to serve this important objective, as well as others, in modern American jurisprudence. Thus, the Supreme Court has recognized that class certification in appropriate cases advances "the efficiency and economy of litigation which is a principal purpose of the procedure." (*quoting General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 159, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982)).

L.Ed.2d 439 (1975); *see also Eisenstadt v. Baird*, 405 U.S. 438, 447, 92. S.Ct. 1029, 31 L.Ed.2d 349 (1972) (noting that rational basis test is not satisfied where legislation places persons into different classes "on the basis of criteria wholly unrelated to the objective of that statute").

Article III, § 40 (30) of the Missouri Constitution prohibits the general assembly from passing any local or special law "where a general law can be made applicable, and whether a general law could have been made applicable is a judicial question to be judicially determined without regard to any legislative assertion on the subject." It is easy to envision ways in which § 71.675 can be made more general; for example, replace "city or town" with "political subdivision," replace "telecommunications company" with "business" or "utility," etc. These changes do not advance the legislature's goal of reducing costly litigation, but neither does § 71.675 as presently drafted.

The best evidence that a general law can be made applicable is that such a framework already exists in the context of Rule 52.08. It is general, applies equally to individuals, businesses and political subdivisions, deters inconsistent results, and ensures a uniform, singular determination of rights and liabilities. Unlike § 71.675, it has the added benefit of actually promoting House Bill No. 209's stated goal. Rule 52.08, which is a rule of general application, should not be made special by § 71.675's partial repeal. There is no rational basis for § 71.675.

C. Relators are entitled to a writ vacating Respondent's order of February 17, 2011, and prohibiting Respondent from striking/dismissing their class action claims pursuant to § 71.675.1, because House Bill No. 209, which

includes § 71.675, violates Mo. Const. art. III, § 23, in that it contains more than one subject and the amendments to the State Highway Utility Relocation Act are not clearly expressed in the bill's title.

Applicable standard of review: "The interpretation of a statute is a question of law, and appellate review is *de novo*." *Nelson v. Crane*, 187 S.W.3d 868, 869 (Mo. banc 2006). Similarly, the "standard of review for constitutional challenges to a statute is *de novo*." *Franklin County ex rel. Parks v. Franklin County Com'n*, 269 S.W.3d 26, 30 (Mo. banc 2008).

Citing *Fust v. Attorney General for the State of Missouri*, 947 S.W.2d 424 (Mo. banc 1997), Respondent ruled that the statute is constitutional within the meaning of Mo. Const. art. III, § 23, because "section 71.675, titled 'Enforcement, collection of business license tax imposed on telecommunications company,' fairly relates to the subject expressed in the title of HB 209, to-wit, the 'assessment and collection of various taxes on telecommunications companies.'" This ruling did not squarely address Winchester's arguments that (i) House Bill No. 209 contains more than one subject, and (ii) the State Highway Utility Relocation Act is not contained in the bill's title.

House Bill No. 209 is titled:

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

The single subject of the bill, as ascertained from its title, is the assessment and collection of various taxes on telecommunications companies. The modifications to §§ 227.241 to

227.249, the State Highway Utility Relocation Act, setting out rules for relocating utilities along highways, do not fairly relate to this subject nor do they have a natural connection to it. *See Hammerschmidt v. Boone County*, 877 S.W.2d 98, 103 (Mo. banc 1994) ("An Act To repeal sections ... relating to elections, and to enact in lieu thereof eleven new sections relating to the same subject" violated single subject requirement by including amendment authorizing a county to adopt a county constitution); *SSM Cardinal Glennon Children's Hosp. v. State*, 68 S.W.3d 412, 417 (Mo. banc 2002) (inclusion of provision extending hospital lien law to additional entities, in a bill for which the title proclaimed the bill as "relating to professional licensing," violated the constitutional single-subject requirement); *Carmack v. Director, Missouri Dept. of Agriculture*, 945 S.W.2d 956, 960-61 (Mo. banc 1997) (bill entitled "relating to economic development" violated single subject requirement of State Constitution insofar as it amended provision of Livestock Disease Control and Eradication Law so as to change rate of compensation paid to owners of livestock slaughtered by State Veterinarian to prevent spread of disease).

Similarly, the amendments to § 227, the State Highway Utility Relocation Act, are not clearly expressed in the bill's title. If House Bill No. 209's subject is the "assessment and collection of various taxes on telecommunications companies," then the title is too restrictive. The State Highway Utility Relocation Act falls outside the scope of that subject. *See Fust*, 947 S.W.2d at 428 (art. III, § 23 may be violated where the subject is "so restrictive that a particular provision is rejected because it falls outside the scope of the subject"). No reasonable person reading the title would understand the bill

to address highways, utilities generally, or the relocation of electric, telephone, telegraph, fiber optic, and cable television facilities.

Relators acknowledge that this Court is reluctant to sustain challenges, like Winchester's, based upon constitutionally imposed procedural limitations. *Fust*, 947 S.W.2d at 427, *citing Hammerschmidt*. Indeed, the Court has permitted "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.*, 2011 WL 2552572 at *6 (Mo. banc 2011), *citing Hammerschmidt*.[14]

Regardless of the merits of the approach, severance is not warranted in this instance. House Bill No. 209, as finally passed, contains two severability clauses: one severing the Municipal Telecommunications Business License Tax Simplification Act, §§ 92.074 to 92.098, from § 71.675, and one severing § 71.675 from the Municipal

[14] The criticism of this approach has been noted. *Prestige Travel*, 2011 WL 2552572 at *6 n. 6. It is too forgiving of legislative enactments; it diminishes Mo. Const. art. III, § 23; it undermines the separation of powers; and it otherwise subverts the legislative process. *Cf. Carmack*, 945 S.W.2d at 959 (Section 23 "is a mandatory, not directory, constitutional provision."). Ultimately, it does no favors for the legislature or the public. *See State v. Ludwig*, 322 S.W.2d 841, 846 (Mo. banc 1959) ("One of the purposes of the constitutional requirement that a bill shall contain but one subject, clearly expressed in its title, is to prevent surprise or fraud upon members of the legislature and to fairly apprise the public of the subject matter of pending legislation.").

Telecommunications Business License Tax Simplification Act, §§ 92.074 to 92.098. *See* §§ 92.092 and 92.098. It does not contain one for the State Highway Utility Relocation Act. To sever the State Highway Utility Relocation Act from § 71.675, as Charter urges, would be pure invention. It would thwart the will of the legislature, because it would ascribe no importance to the legislature's decision to include two severability clauses but not three. *See State ex rel. School Dist. of Kansas City v. Young*, 519 S.W.2d 328, 332 (Mo.App. 1975) (rules of construction "should be subservient to legislative intent"); *Murray v. Missouri Highway and Transp. Com'n*, 37 S.W.3d 228, 233 (Mo. banc 2001) (the primary rule of construction "is to ascertain the intent of the legislature *from the language used*"; furthermore, "the legislature is not presumed to have intended a meaningless act") (emphasis added). Although upholding legislative intent leads to the conclusion that the Bill is unconstitutional, this result is dictated by the plain language of Mo. Const. art. III, § 23.

V. CONCLUSION

On May 31, 2011, this Court issued a preliminary writ to show cause why a writ of prohibition should not issue prohibiting Respondent from doing anything other than vacating his February 17 order. Relators pray for entry of a final judgment in prohibition or, in the alternative, mandamus.

Respectfully submitted,

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