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

REPLY BRIEF OF RELATORS

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I. INTRODUCTION

In *Reichert v. Lynch*, 651 S.W.2d 141 (Mo. banc 1983), the Court found that a statute purporting to curtail a civil practice, otherwise permitted by rule, is "inconsistent" within the meaning of Rule 41.02's supersession clause. In *State ex rel. K.C. v. Gant*, 661 S.W.2d 483 (Mo. banc 1983), the Court found that a statute amending a rule is ineffective for purposes of Mo. Const. art. V, § 5, if it is not limited to that purpose and does not expressly refer to the rule. In *Planned Ind. Expansion Auth. v. Southwestern Bell Tel. Co.*, 612 S.W.2d 772 (Mo. banc 1981), the Court said it is "clear" that a law preferring telecommunications companies to other utilities is violative of the constitutional ban on local or special laws.

In its response brief, Charter mentions *Gant* in a footnote, refers to *P.I.E.*'s conclusion as *dictum*, ignores *Reichert* altogether, and does not strenuously contend that House Bill No. 209's amendments to § 227[1] comport with the single subject and clear title requirements of Mo. Const. art. III, § 23. In short, Charter offers little in the way of counter-argument and nothing to alter the conclusion that § 71.675 and House Bill No. 209 are unconstitutional.

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

II. ARGUMENT

A. Section 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.

Charter continues to erroneously maintain that § 71.675 addresses the substantive issue of standing and is, therefore, beyond the rule-making power of this Court. Resp.Br. at 15-20. Winchester has standing if, as alleged here, it has suffered a financial injury, the defendants caused that injury, and the injury can be redressed by a judicial decision. *See, e.g., Phillips v. Missouri Dept. of Social Services*, 723 S.W.2d 2, 4 (Mo. banc 1987). The trial court is empowered to entertain Winchester's claims and to enter judgment for or against the parties. *See, e.g., Barker v. Danner*, 903 S.W.2d 950, 957 (Mo.App.W.D. 1995). Nothing in § 71.675 alters the conclusion that Respondent possesses adjudicatory competence. It is undisputed that Winchester has standing to pursue the *individual* claims set forth in its petition before and after § 71.675. It is undisputed that Respondent has jurisdiction to hear the *individual* claims set forth in Winchester's petition before and after § 71.675. It follows that § 71.675 does not implicate standing or subject-matter jurisdiction.

Section 71.675 sets forth the procedures to be followed when there are many "Winchesters" desirous of pursuing claims to collect business license taxes from a telecommunications company. In such circumstances, the statute attempts to prevent them from pursuing a representative action for purposes of resolving common questions

in a single suit as allowed by Rule 52.08; instead, they must pursue multi-plaintiff or individual actions throughout the State. Section 71.675 is quintessentially procedural, because it alters only how certain claims are processed.

Citing *Farmer v. Kinder*, 89 S.W.3d 447, 451-52 (Mo. banc 2002) and § 447.575, Charter argues that a statute containing the phrase "shall bring an action" connotes an intent to confer standing. Resp.Br. at 16-17. This elevates form over substance. Even if § 447.575 gives rise to standing, its compulsion – that the state treasurer shall bring an action in an appropriate court to take delivery of state property – does not dictate the procedures to be followed in a particular action. The same defect undermines the parallels Charter seeks to draw with other statutory provisions. Resp.Br. at 17, *citing* §§ 448.070, 570.123, 302.756.3 and 370.150.4. These statutes either compel or prohibit the bringing of actions and do not address the procedures to be followed, except to identify in whose names the suits shall be brought (in the cases of §§ 302.756.3 and 370.150.4). They differ from § 71.675 in kind and degree. Section 71.675 substitutes one procedural device (joinder) for another (class actions) in specified cases. This is its *raison d'etre*. Section 71.675 is procedural because, as stated in *Reese*, it "prescribes the method to carry on [a] suit." *State v. Reese*, 920 S.W.2d 94, 95 (Mo. banc 1996). No other construction is possible.

Charter cites several cases, *State v. Teer*, 275 S.W.3d 258 (Mo. banc. 2009), *State ex rel. Kinsky v. Pratte*, 994 S.W.2d 74 (Mo.App.E.D. 1999), *State v. Jaco*, 156 S.W.3d 775 (Mo. banc 2005), and *Lorenzini v. Short*, 312 S.W.3d 467 (Mo.App.E.D. 2010), for the proposition that "where the legislature has enacted a statute pertaining to a procedural

matter that is not addressed by or inconsistent with any Supreme Court rule, the statute must be enforced." Resp.Br. at 8-15.[2] This proposition collapses when applied here.

First, in order for the proposition to apply, the legislature must have enacted a statute pertaining to a procedural matter. This is a tacit admission by Charter that § 71.675 is procedural, something it has resisted. *See* Resp.Br. at 15 ("The statute (Section 71.675) is not procedural"). If it is not procedural, then the premise has no application.

Second, the statute prevails only if it pertains to a procedural matter *not* addressed by *or* inconsistent with a Supreme Court rule. Charter's basis for claiming that the statute and rule address different things is its assertion that "section 71.675 addresses the substantive issue of standing." Resp.Br. at 15; *see also* Resp.Br. at 9 ("Rule 52.08…says

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[2] Three of the four decisions, *Teer*, *Jaco* and *Lorenzini*, make no mention of Mo. Const. art. V, § 5, Rule 41.02 or *Gant*. Elsewhere in its response brief, Charter argues that "when an issue is not litigated in a case," this Court should disregard such authority. Resp.Br. at 28-30. In *Kinsky*, the only decision to discuss Rule 41.02 and Mo. Const. art. V, § 5, the Missouri Court of Appeals, Eastern District, found that a statute conferring on the state the substantive right to take discovery depositions in criminal cases did not conflict with a rule authorizing depositions to preserve testimony, because "neither the constitution nor the rule prohibit discovery depositions." *Kinsky*, 994 S.W.2d at 77-78. It is difficult to see how this decision helps Charter because, in contrast to *Kinsky*, § 71.675 expressly prohibits what Rule 52.08 permits. It is this conflict that is lacking in *Kinsky*.

nothing about who specifically has legal standing to move 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 issue of whether cities and towns have standing to act as class representatives when suing telecommunications companies for the collection of various taxes.").[3] Because Section 71.675 does not address the "substantive issue of standing," *supra*, the distinction Charter seeks to draw is not present.

Plainly, Rule 52.08 and § 71.675 "address" the propriety of class actions; plainly, they are in "conflict." The Rule giveth and the statute taketh away. A conflict exists, for purposes of Missouri jurisprudence, where one law permits what another law prohibits and *vice versa*. *See* Brief of Relators at 17-18 and the cases cited therein. Charter seems to contend that an express reference to "municipal class actions" in both contexts is

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[3] In a footnote, Charter argues, without citation to authority, that the *Erie* doctrine supports its conclusion that § 71.675 is substantive. According to Charter, the General Assembly's reference to federal courts in § 71.675 "indicates that it is intended to affect substantive, not procedural, rights." Resp.Br. at 19 n. 6. Relators draw the opposite conclusion. "Under the *Erie* doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law." *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 427, 116 S.Ct. 2211 (1996). Thus, if § 71.675 is substantive, it applies in diversity suits without qualification. There would be no imperative to mention federal courts if, as Charter claims, § 71.675 was truly substantive. It would apply automatically.

necessary for Rule 41.02 and Mo. Const. art. V, § 5 to apply, but neither provision requires such specificity. Rule 41.02 does not differentiate between direct and indirect conflicts; Mo. Const. art. V, § 5 does not differentiate between greater and lesser impairments. An annulment, amendment or conflict, no matter its degree, is sufficient to trigger the provisions of Rule 41.02 or Mo. Const. art. V, § 5. *See, e.g.*, *Huston v. State*, 272 S.W.3d 420, 421 (Mo.App.E.D. 2008) (though statute did not use the words "writs of *coram nobis*," court found that rule abolishing writs of *coram nobis* was inconsistent with statute permitting writs of error upon final judgment).

On several occasions, Charter refers to "general" and "specific" provisions in its response brief. Presumably, Charter intends for the specific provisions of § 71.675 to control over the general provisions of Rule 52.08. *See* Resp.Br. at 8-9. This analysis finds no support in the text of Rule 41.02 or Mo. Const. art. V, § 5. Instead, it derives from a rule of statutory interpretation, such that when the same subject matter is addressed in general terms in one statute and in specific terms in another statute, the more specific controls over the more general. This rule applies to statutes, enacted by the same branch of government, and if it is considered at all, it is an admission of a conflict. *See Spearman v. Western Missouri Mental Health Ctr.*, 108 S.W.3d 801, 805 (Mo.App.W.D. 2003) ("The rule that a more specific statute governs over a more general statute only applies in situations where there is a 'necessary repugnancy' between the statutes."); *PDQ Tower Services, Inc. v. Adams*, 213 S.W.3d 697, 699 (Mo.App.W.D. 2007) ("The rule of statutory construction that when the same subject is addressed in general terms in

one statute and specific terms in another, the more specific controls, does not apply in this situation because there is no conflict…").

In its discussion of *State ex rel. Missouri Public Defender Comm. v. Pratte*, 298 S.W.3d 870 (Mo. banc 2009), Charter argues that "Relators'…appear to assert that analogy to the *Missouri Public Defender* case is improper because section 71.675 was enacted after Rule 52.08." Resp.Br. at 13. Relators make no such claim. Rule 41.02 does not concern itself with the order of things, it merely speaks of conflict. And Mo. Const. art. V, § 5 presupposes that there has been a statutory amendment of an existing court rule. Relators' arguments are not diluted by the fact that the statute succeeded the rule.

Charter also suggests that the "two analogies from the *Missouri Public Defender* case cited by Relators…are irrelevant to the discussion in this case because they deal with conflicts between statutes and regulations, a subject not covered by article V, section 5 of the Constitution and not at issue here." Resp.Br. at 12-13 n. 2. Relators are fully cognizant of the differences between statutes, rules and regulations, and the topics covered by Mo. Const. art. V, § 5. Relators cited the earlier examples from *Pratte* in order to demonstrate types of conflict. Charter opts to ignore them rather than attempt to explain why they are inapposite.

B. Section 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.

Charter cites *Prestige Travel* for the proposition that "taxing statutes must be construed strictly, and taxes are not to be assessed unless they are expressly authorized by law." Resp.Br. at 5. This statement suggests that Charter does not fully appreciate the scope of § 71.675. It is not a taxing statute. It classifications are made for purposes of dictating court processes, not for purposes of taxation.

Charter notes that many legislative enactments single-out businesses, including utilities, for particularized treatment. Resp.Br. at 27. The list of industry-specific laws is indeed long. The list of decisions striking-down industry-specific laws is also long. It should be obvious that no constitutional conclusions can be drawn from these observations. Relators are not suggesting that business-specific classifications are *per se* unconstitutional, only that legislation must apply equally to given classes and the classifications must be made upon a reasonable basis. *See State, on Inf. of Taylor, v. Currency Services*, 218 S.W.2d 600, 604-05 (Mo. banc 1949) ("We concede that the general assembly may pass laws applicable to a particular class, but such a law must bear equally upon all persons coming naturally within the class."; "Classification based upon a reasonable difference does not violate the constitutional provision, but a merely arbitrary distinction cannot be sustained."). Relators advance the unremarkable proposition that, although the legislature has some discretion in defining classes, the classifications must not be arbitrary, unreasonable or partial. Section 71.675, the only statute under

consideration, is constitutionally infirm because, *inter alia*, its classifications are arbitrary, irrational and self-defeating. They impede the General Assembly's stated goal of reducing costly litigation and ignore the efficiencies afforded by Rule 52.08. The legislative classifications are made for purposes of discriminating against one type of plaintiff, suing one type of defendant, for one type of relief. The legislative implication is that class actions against telecommunications companies are more costly than class actions against other businesses. The proposition lacks empirical or logical support and is obviously preposterous.[4]

[4] Relators are not asking the Court to second-guess the motives of the General Assembly, only that it use its own processes of logic in determining the reasonableness of the statutory classifications. *See City of Springfield v. Smith*, 19 S.W.2d 1, 3-4 (Mo. banc 1929) (The "constitutional mandate in clear and unambiguous language directs that the question as to whether a general law could have been made applicable is 'a judicial question and as such shall be judicially determined.' This does not mean that the judiciary can dodge the question by modestly deferring to the wisdom of the lawgiver as to the soundness of the classification or that it may hide behind a presumption, if to the judicial mind unreasonableness as to classification appears. But it does mean (unless the above-mentioned clause is to be held meaningless) that the judiciary shall use its own processes of logic in determining the presence or absence of reasonableness or unreasonableness in the given classification.").

In seeking to justify § 71.675, Charter states that "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." Resp.Br. at 1. This statement, for the most part, is indistinguishable from the argument made by Sprint to justify the Municipal Telecommunications Business License Tax Simplification Act in *City of Springfield*. As the Court remarked:

> Sprint…argues that adoption of the Act was an attempt by the legislature to achieve a balance between the needs of utilities and cities. Most legislation is an attempt to balance the needs of citizens or businesses. Such is not a basis to ignore constitutional requirements.

City of Springfield v. Sprint Spectrum, L.P., 203 S.W.3d 177, 186 n. 12 (Mo. banc 2006).

Elsewhere, Charter seeks to justify § 71.675's exclusionary treatment with the following:

> 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.

Resp.Br. at 31. Despite the lengthiness of the quote, Charter actually says very little – certainly nothing that can withstand thoughtful scrutiny.

A large part of Charter's justification for § 71.675 rests on the supposition that no cohesive class can be certified because of differences among cities, enabling statutes, and ordinances. If this is true, which Relators deny, existing Rule 52.08 provides sufficient safeguards without resorting to special legislation. Pursuant to Rule 52.08, Respondent can deny class certification because of, *inter alia*, the absence of common questions, the lack of typicality, or the predominance of individual issues. Charter's other justification for § 71.675, *i.e.*, the heavily-regulated nature of the telecommunications industry, is just plain vacuous. All business is regulated to some extent. The level of regulation is not the touchstone of constitutional scrutiny. If it was, the General Assembly would not be justified in limiting § 71.675's class action ban to one regulated industry, but rather it would be required to extend it to other, equally regulated industries (*e.g.*, electric, water, and similar PSC entities). Charter's argument exposes the flaw in § 71.675's classifications, not its saving grace.

Moreover, Charter's proffered justification for § 71.675's classifications is not the one given by the General Assembly, which is to reduce costly litigation that has or may be filed against telecommunications companies. § 92.089.1. The fallacies of this claim are discussed more fully in the Brief of Relators and are not repeated here. *See* Rule 84.04(g) ("The appellant may file a reply brief but shall not reargue points covered in the appellant's initial brief.").[5]

[5] In this section of its response brief, Charter makes a number of charges that are demonstrably untrue, all of which imply that Relators are making "new" arguments. For example, Charter states that "Relators now, for the first time, suggest that section 71.675 violates the special law test articulated in *Reals v. Courson*," and "Relators argued for the first time in their petition to this Court…that section 71.675 is a special law because it regulates only telecommunications companies, but not all other Missouri businesses." Resp.Br. at 23 and 26. In truth, Relators cited *Reals* below (Ex at 304-05) and referenced *Reals* in a proposed order denying Charter's motion to strike class allegations. Although not part of the record, because it did not seem pertinent, Relators served the proposed order on Respondent and opposing counsel on December 7, 2010. Likewise, Relators cited *P.I.E.*, *City of Springfield v. Smith*, and *McKaig v. Kansas City* in the court below (Ex at 304-05, 308-310), the point of which was to demonstrate that House Bill No. 209's classifications are exclusionary, not only as to utilities but as to other similarly-situated businesses.

C. 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.

Relators do not quarrel with much of Charter's legal analysis concerning the single subject and clear title requirements of Mo. Const. art. III, § 23. The parties differ on the result to be achieved.

Citing *Fust*, Charter notes that challenges, like Winchester's, based upon constitutionally imposed procedural limitations are "not favored." The quoted language

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Elsewhere, Charter states that "[i]n 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 'judical dictum.'" Resp.Br. at 29. Relators made the argument in response to Charter's contention that *P.I.E.* is not controlling, because "the parties had not addressed the special law issue." *See* Answer/Return to Preliminary Writ of Prohibition at 23 n. 4. It is difficult to see how Relators can be faulted for responding to an argument, *made by Charter*, by pointing out that *P.I.E.*'s discussion is more akin to judicial *dictum* than to *obiter dictum*. It is a minor point anyway, because this Court cited *P.I.E.*'s analysis and conclusion with approval in *City of Springfield*. *Id.*, 203 S.W.3d at 187. Charter does not dispute *P.I.E.*'s reasoning; it chooses, instead, to rely on its claim of *dictum*. Resp.Br. at 28-30.

appears to date to the 1994 decision in *Hammerschmidt v. Boone County*, 877 S.W.2d 98, 102 (Mo. banc 1994); the *Hammerschmidt* Court cites no case law for the proposition. Relators respectfully question whether it is appropriate to characterize some types of constitutional scrutiny as disfavored. This appears to place some constitutional protections on a higher perch than others. It suggests that the Constitution's single subject and clear title requirements, some version of which have appeared in every Missouri Constitution since 1865, lack continuing vitality. If Mo. Const. art. III, § 23 is to be seen, but not heard from, then it is little more than a historical footnote, a curiosity.

The Court does grant procedural leeway to the legislature and it indulges the notion of severability, whereby constitutionally infirm parts are severed rather than declaring the entire bill invalid. Regardless of § 1.140, this practice finds no support in the language of Mo. Const. art. III, § 23. As commentators have noted, severance, although well-intentioned, actually does a disservice to lawmakers and the public. *See St. Louis County v. Prestige Travel, Inc.*, 2011 WL 2552572 at *6 (Mo. banc 2011). It subverts one of the animating purposes of the constitutional requirement, which is "to prevent surprise or fraud upon members of the legislature and to fairly apprise the public of the subject matter of pending legislation," *State v. Ludwig*, 322 S.W.2d 841, 846 (Mo. banc 1959), by giving piecemeal effect to an otherwise unconstitutional bill.

In Relators' brief, they argue that severance is not warranted because House Bill No. 209, as finally passed, contains two severability clauses, neither of which allow for severance of the State Highway Utility Relocation Act. According to Charter, Relators misstate the contents of the Bill: in actuality, House Bill No. 209 contains one

severability clause and one *non*-severability clause. But Relators' original point remains: since the General Assembly knows how to draft a severability clause, which it inserted in § 92.098 (together with a non-severability clause in § 92.092), the absence of one in connection with the State Highway Utility Relocation Act must mean something. Although the Court has stated that the absence of a severability clause is of "no significance," *Barhorst v. City of St. Louis*, 423 S.W.2d 843, 851 (Mo. banc 1967), this is inapplicable in the context of House Bill No. 209. It would ascribe no importance to the legislature's decision to include one severability clause but not two. According to Charter, "[f]aced 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." Resp.Br. at 37 (emphasis added). Realtors disagree and believe that the General Assembly's intent is quite clear: the State Highway Utility Relocation Act is not severable. But even if Charter is correct, how can this Court determine beyond a reasonable doubt what specific provisions of House Bill No. 209 are essential to the efficacy of the bill as required for severance?

Charter begins and ends its constitutional analysis by focusing almost exclusively on § 71.675. According to Charter, since § 71.675 "falls squarely within [the Bill's] single purpose and is more than adequately described by [the Bill's] clear title," constitutional scrutiny draws to a close. This is fairly deducible from the standpoint of Missouri jurisprudence, but it is flawed. Relators' challenge is not to § 71.675 in isolation, but to House Bill No. 209 as a whole. If the Court is in the business of parsing

bills, as Charter suggests, in order to divine the "essential," "original" and "controlling" provisions (*SSM Cardinal Glennon*; *Hammerschmidt*), then it is, in some measure, in the business of legislating. Recently, the Illinois Supreme Court upheld three substantive bills and one appropriations bill, enacted as part of a "capital projects" plan, against a series of single subject and clear title challenges. In the course of its opinion, the Illinois Supreme Court noted:

> It is generally held that when an act contains two or more subjects in violation of the single subject rule, the reviewing court cannot choose which subject is the "right" one and eliminate the other. Such a determination would "inject[ ] the courts more deeply than they should be into the legislative process." *Litchfield Elementary School District No. 79 v. Babbitt*, 125 Ariz. 215, 608 P.2d 792, 804 (Ariz.Ct.App.1980); *Power, Inc. v. Huntley*, 39 Wash.2d 191, 235 P.2d 173, 178 (1951) (when an act embraces two subjects it is impossible for a court to choose between the two). Largely for this reason, a single subject challenge is directed toward the act as a whole. Because there is no "right" subject that the court can look to, " '[t]here is no one provision or feature of the act that is challenged as unconstitutional, such that the defect could be remedied by a subsequent amendment which simply deleted or altered that provision or feature.' " *People v. Olender*, 222 Ill.2d 123, 145–46, 305 Ill.Dec. 1, 854 N.E.2d 593 (2005) (quoting *Johnson v. Edgar*, 176 Ill.2d 499, 511–12, 224 Ill.Dec. 1, 680 N.E.2d 1372 (1997)); *Litchfield*, 608 P.2d at 804 ("Since the enactment in question is infected by reason of the combination of its various elements rather than by any invalidity

> of one component, the otherwise salutary principle of severance and partial savings of valid portions does not apply"); *Huntley*, 235 P.2d at 178 (when an act embraces " 'two distinct objects, when the constitution says it shall embrace but one, the whole act must be treated as void' " (quoting 1 Walter Carrington, Cooley's Constitutional Limitations 308 (8th ed.1927))).

Wirtz v. Quinn __ N.E.2d __, 2011 WL 2672529 at *18 (Ill. 2011). Relators respectfully suggest that this approach is correct. Because there is no "right" subject the Court can look to, Relators do not challenge any one provision or feature of House Bill No. 209 as unconstitutional. They challenge House Bill No. 209 as a whole.

Relators contend that by incorporating the amendments to § 227, the State Highway Utility Relocation Act, House Bill No. 209 plainly and undoubtedly violates the single subject and clear title requirements of Mo. Const. art. III, § 23. Charter does not seriously dispute the proposition and limits its focus to § 71.675. This leads, unsurprisingly, to the wrong result. If the Bill as a whole violates the single subject and clear title requirements of Mo. Const. art. III, § 23, then the Bill as a whole is unconstitutional. That § 71.675 may or may not be constitutional under Mo. Const. art. III, § 23 tells us nothing about whether the Bill is or is not constitutional under Mo. Const. art. III, § 23.

Charter's effort to cure House Bill No. 209 by way of severance, on the basis of misguided notions of expediency and deference, should be rejected. Saving House Bill No. 209 from its deserved fate lacks fealty to the Constitution and to the words used, and not used, by the General Assembly.

D. Charter's suggestion that Relators "go to the General Assembly and attempt to change the law" is not a serious response to the constitutional questions presented.

Charter devotes considerable space to advancing the proposition that the State has broad powers to regulate itself and its political subdivisions, citing *Premium Standard Farms, Inc. v. Lincoln Township of Putnam County*, 946 S.W.2d 234, 238 (Mo. banc 1997) (local governments "have no inherent powers but are confined to those expressly delegated by the sovereign"), §65.270 ("[n]o township shall possess any corporate powers, except such as are enumerated or granted by this chapter.."), § 65.260, § 77.010, and similar authorities. *See* Answer/Return to Preliminary Writ of Prohibition at 18, 30-32; Resp.Br. at 4, 38-40. Relators do not quarrel with these general statements of law, but they are *apropos* of nothing. The powers of the State over its political subdivisions, no matter how broad, are tempered by the Missouri Constitution. *See Kansas City v. J.I. Case Threshing Mach. Co.*, 87 S.W.2d 195, 199 (Mo. 1935) ("Because of the evils which grew out of this almost unlimited power of the Legislature to interfere, by special act, in the local affairs of every community, the framers of the Constitution of 1875 adopted numerous limitations to establish the right of local self-government in many matters."). As *City of Springfield* demonstrates, this Court will not hesitate to uphold the Missouri Constitution as supreme law, regardless of the State's expansive authority over its constituent members.

Questions about whether the State can alter procedural rules or restrict the power of municipalities to sue are not germane to this writ petition. The issue is whether the

State can annul, in part, a procedural rule adopted by a coequal branch of government, which has the force of law, in a manner inconsistent with Mo. Const. art. V, § 5 and *Gant*. It is whether the State is justified in adopting a law that is partial and exclusionary in these circumstances. It is whether, prior to passage, the State afforded reasonably definite information to legislators and citizens about the subject-matter of House Bill No. 209. To blithely suggest, as Charter does, that any constitutional scrutiny be limited, because "Relators' remedy, if any, is to seek to change the law through the General Assembly," Answer/Return at 31, is not a substantive response to these issues.

E. Charter's "capacity to sue" argument has been waived.

On at least one occasion in its response brief, Charter argues that Rule 52.08 and § 71.675 do not conflict because the statute, unlike the rule, addresses the capacity of municipalities to sue. Resp.Br. at 38. In the court below, however, Charter consistently maintained that § 71.675 implicates the doctrine of standing. Ex. at 356-57 ("Section 71.675 of the Revised Missouri Statutes 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"; Rule 52.08 "says nothing about who has legal standing"; the "rule is silent on the standing to sue issue addressed by the statute"). Charter did not raise capacity to sue in its motion to dismiss or responsive pleading, nor was it addressed by Respondent in his February 17 order. Ex. at 207-219; 220-226; 367-371.

Although Charter blurs the distinction in its argument, "standing" and "capacity to sue" are not the same. As recognized in *City of Wellston*,

> Capacity to sue refers to the status of a person or group as an entity that can sue or be sued, and is not dependent on the character of the specific claim alleged in the lawsuit....
>
> Standing to sue evaluates the sufficiency of a plaintiff's interest in the subject of the lawsuit. It is a concept used to ascertain if a party is sufficiently affected by the conduct complained of in the suit, so as to insure that a justiciable controversy is before the court ... Objections to standing, unlike objections based on the real party in interest rule, cannot be waived ...

City of Wellston v. SBC Communications, Inc., 203 S.W.3d 189, 193 (Mo. banc 2006). *See also Midwestern Health Management, Inc. v. Walker*, 208 S.W.3d 295, 298 (Mo.App.W.D. 2006) (stating that the respondent confused the issue of capacity to sue with standing to sue); *Earls v. King*, 785 S.W.2d 741, 743 (Mo.App.S.D. 1990) (noting that the appellants confused the issue of capacity to sue with standing to sue).

A claim that a party lacks capacity to sue is waived if it is not raised in a motion or responsive pleading in accordance with Rules 55.13 and 55.27(g)(1)(E). *Cornejo v. Crawford County*, 153 S.W.3d 898, 901 (Mo.App.S.D. 2005). A general denial is not sufficient to preserve the issue. *Id*. Here, Charter did not raise capacity to sue in its motion to dismiss or by specific negative averment in its responsive pleading. It cannot be argued for the first time in this Court. *Id*. ("Respondent's capacity to sue cannot be raised for the first time on appeal."). The issue was not briefed or considered by Respondent; accordingly, it has been waived.

III. 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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COUNSEL FOR RELATORS

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.	)	

CERTIFICATE OF COMPLIANCE

Relators, Collector of Winchester, Missouri and City of Winchester, Missouri, hereby certify that on September 1, 2011, they caused the Reply Brief of Relators to be filed in PDF format using the Missouri eFiling System. For the convenience of the Supreme Court, Relators also mailed a copy of the electronic document on a read-only disc (CD-R).

The Reply Brief of Relators is consecutively numbered, double-spaced (except for the caption, signature block, and certificate of service), with margins of not less than one inch, and uses characters that are not smaller than 13 point. It has been prepared in a proportionally spaced typeface using Microsoft Word 2007. The number of words in the

Reply Brief is 5,466. The electronic document has been signed by John W. Hoffman, one of the attorneys for Relators.

All materials in the CD-R have been scanned using Symantec, and the CD-R is virus-free.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Reply Brief of Relators, together with CD-R, was sent via U.S. Postal Service first class mail, postage prepaid, this 1st day of September, 2011, to the following:

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