**SC95337**

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**IN THE MISSOURI SUPREME COURT**

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**MISOURI MUNICIPAL LEAGUE,**
**CITY OF SPRINGFIELD, MO**
**and RICHARD SHEETS**
**Appellants**

**v.**

**STATE OF MISSOURI**
**Respondent.**

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# APPELLANTS' BRIEF

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## STATEMENT OF THE COURT'S APPELLATE JURISDICTION

The underlying suit is a challenge by declaratory judgment action to the Constitutional validity of statutes enacted by the General Assembly in 2014 by Senate Bill 649 and Senate Bill 650. This appeal is from a final judgment by the Circuit Court of Cole County, Division I, The Honorable Jon E. Beetem, presiding, in which the trial court granted judgment on the pleadings and dismissed the plaintiffs' suit, thereby disposing of all issues raised by all parties. This Court has as original appellate jurisdiction under Mo. Const. Art. V § 3[1].

## STATEMENT OF FACTS

**HB 331 (2013) and HB 345 (2013)—the predecessors of SB 649 (2014) and SB 650 (2014)**

On October 17, 2013, the Circuit Court of Cole County, Missouri, Division IV, The Honorable Patricia S. Joyce, presiding, declared two bills passed by the General Assembly in 2013, HB 331 (2013) and HB 345 (2013) each to be "invalid, unenforceable, and unconstitutional and of no force and effect in [their] entirety." LF 33, A 26 (Judgment in *City of Liberty et. al., v. State of Missouri*, Cole County Case No. 13AC-CC00503). The judgment so holding found that each bill was enacted contrary to the prohibition against amending a bill "as to change its original purpose," Mo. Const. Art. III § 21, and contrary to the requirement that each bill pertain to "one subject…clearly expressed in its title," Mo. Const. Art. III § 23. LF 28-31, A 21-24.

[1] All constitutional references are to the Constitution of Missouri, 1945, as amended.

The State appealed the 2013 Cole County circuit court decision to this Court (Case No. SC93799). This Courtdismissed that appeal on August 28, 2014. LF 243, A 75 (trial court's Judgment in the instant case).

**SB 649 (2014) partially re-enacts HB 331 (2013)**

HB 331 (2013) repealed seven statutes and enacted 22 new ones "in lieu thereof." LF 53, A 34. In broad terms, these dealt with Missouri local government control over telecommunications infrastructure permitting, and local government control over public right-of-way in which public utilities including telecommunications companies place infrastructure.

Among the sections repealed and enacted anew by HB 331 (2013) was Section 67.1842.[2]. LF 53, A 34. The only 2013 change to Section 67.1842 was to add a sixth paragraph to subsection 1, as bolded below:

> 1. In managing the public right-of-way and in imposing fees pursuant to sections 67.1830 to 67.1846, no political subdivision shall…
>
> **(6) Require any public utility that has legally been granted access to the political subdivision's right-of-way prior to August 28, 2001, to enter into an agreement or obtain a permit for general access to or the right to remain in the right-of-way of the political subdivision.**

LF 58-59, A 39-40 (HB 331, p. 6-7, bold in original).

[2] All statutory references are to the Revised Statutes of Missouri, 2000, as amended.

Bold text in a Missouri House bill designates "proposed language" to be added to a statute. LF 53, A 34 (explanatory note on bill); LF 59, A 40; LF 209 (House Rule 39).

This newly enacted subsection 6 never went into effect because the circuit court entered its preliminary injunction in the *Liberty* case on August 27, 2013, which the judgment of October 17, 2013 made permanent. LF 33, A 26.

While the 2013 circuit court judgment invalidating SB 331 (2013) was in effect, the General Assembly passed SB 649 (2014), repealing four sections of the revised statutes and enacting the same four anew, including Section 67.1842.1(6). LF 34, A 27. SB 649 (2014) was introduced on January 8, 2014, subsequently passed in both chambers, and was signed into law by the Governor on March 20, 2014. LF 12-13, A 5-6 (Petition, ¶¶ 19-22).

The explanatory note at the bottom of the first page of SB 649 (2014), states: "Matter enclosed in bold-faced brackets **[**thus**]** in this bill is not enacted and is intended to be omitted." LF 34, A 27 (bold brackets in original); see also LF 150 (Senate Rule 46). As truly agreed and finally passed, SB 649 (2014) made one change to Section 67.1842.1(6). That change is also shown in bold brackets below, just as it was shown in SB 649 (2014):

> In managing the public right-of-way and in imposing fees pursuant to sections 67.1830 to 67.1846, no political subdivision shall…
>
> (6) Require any public utility that has legally been granted access to the political subdivision's right-of-way **[**prior to August 28, 2001**]**, to

> enter into an agreement or obtain a permit for general access to or the right to remain in the right-of-way of the political subdivision.

LF 39-40, A 32-33 (bold brackets in original).

As the explanatory note at the bottom of SB 649 (2014) states, all of the language in Section 67.1842.1(6), including the bold bracketed language is language as the law is asserted to exist up to the time when the bill is passed. SB 649 (2014) changed by removing only the 2001occupancy date requirement which was enacted in the original stricken bill, HB 331, from the 2013 session.

In response to the State's suggestions opposing the plaintiff's motion for judgment on the pleadings, the plaintiffs provided a copy of two bill summaries prepared for SB 649 (2014), one as the bill was introduced, the second as truly agreed and finally passed. Even though the circuit court judgment in *Liberty* invalidated HB 331 (and therefore invalidated the new law it created, Section 67.1842.1(6), among others), the published bill summaries both described the law being amended as if Section 67.1842.1(6) were and had remained in effect notwithstanding the 2013 *Liberty* judgment of invalidity, stating:

> Currently, no political subdivision shall require any public utility granted right-of-way access prior to August 28, 2001 to enter into an agreement or obtain a permit for general access to remain in the right-of-way. This act removes this date and allows any public utility that has been granted right-of-way access to remain in the right-of-way without entering into an agreement or obtaining a permit for general access.

LF 205-06. For comparison, some other changes to the sections which were shown to have been enacted by HB 331(2013) in bold type as new legislation, and which are shown as existing law in SB 649 (2014) in un-bolded type, include:

| HB 331(2013) | SB 649 (2014) | Substance |
|---|---|---|
| LF 55, A 36 | LF 36, A 29 | Section 67.1830(f)(prohibiting collection of permitting costs incurred in local permitting from public utilities) |
| LF 57, A 38 | LF 39, A 32 | Section 67.1836.3 (deems right-of-way permit application approved if not acted upon sooner) |

**SB 650 (2014) partially re-enacts HB 331 (2013) and completely re-enacts HB 345 (2013)**

HB 345 (2013) is four pages as truly agreed and finally passed. LF 89-92, A 70-73. The entire text of HB 345 (2013) is new matter shown in bold type except for the paragraph in bold brackets on the last page. LF 89, A 70.

In SB 650 (2014), the matters passed but held invalid in HB 345 (2013) appear as language of existing sections in regular type. LF 89-92, A70-73 (HB 345); LF 87-88, A 68-69 (SB 650).

In SB 650 (2014) all of the newly enacted but invalidated provisions of HB 331 (2013) creating Sections 67.5090, 5092, 5094, 5096, 5098, and 5100 appear as regular type or bracketed to show existing language within the sections. LF 59-67, A 40-48 (HB 331, p. 7-15); LF 78-87, A 59-68 (SB 650, p. 1-10).

For example, HB 331 (2013)—in creating Section 67.5096 (relating to regulation of "new wireless support structures")—provides for judicial review of state and local government action on structure permit applications, Section 67.5096.6 states:

> **A party aggrieved by the final action of an authority, either by its affirmatively denying an application under the provision of this section or by its inaction, may bring an action for review in any court of competent jurisdiction.**

LF 65, A 46 (HB 331, p. 13, bold in original). In 2014 when this same Section, 67.5096.6, re-appears in SB 650, it states:

> A party aggrieved by the final action of an authority, either by its affirmatively denying an application under the provision of this section or by its inaction, may bring an action for review in any court of competent jurisdiction **within this state**.

LF 84, A 65 (SB 650, p. 7, bold in original). Instead of showing the statute to be altogether newly enacted, or as being re-enacted after being previously stricken by the circuit court of Cole County, this language reflects a three word addition, which limits judicial review of administrative decisions on state and local permit applications to Missouri courts.

The bill summary for SB 650 states that:

> This act modifies the Uniform Wireless Communications Infrastructure Deployment Act. Currently, parties aggrieved…may bring an action for

> review in any court of competent jurisdiction. This act requires that the court be in this state.

LF 207.

The drafter repeated the same practice throughout SB 650 (2014) of showing language from HB 331 (2013) as if were existing law. See LF 66, A 47 (HB 331, p. 14, enacting Section 67.5098.6); LF 67, A 48 (HB 331, p. 15, enacting Section 67.5100.5).

**Plaintiffs file suit in Cole County circuit court to challenge SB 649 (2014) and SB 650 (2014)**

The plaintiffs brought suit "FOR DECLARATORY JUDGMENT, INJUNCTION, AND OTHER RELIEF," in the Cole County circuit court on August 26, 2014, two days before SB 649 and SB 650 were to go into effect. LF 8, 9, 13, A 1, 2, 6.

The following paragraphs identify the plaintiffs:

> Plaintiff MISSOURI MUNICIPAL LEAGUE ("MML") is a membership association of Missouri municipalities, including cities, towns, and villages…[and]…MML's purpose includes advocating for fair and reasonable regulations of Missouri municipalities and opposing legislation that is harmful to Missouri municipalities.

LF 9-10, A 2-3 (Petition, ¶¶ 1, 9).

> The CITY OF SPRINGFIELD ("Springfield") is a political subdivision of the State of Missouri operating as a constitutional charter city located in Greene

County which through its ordinances, resolutions, policies and procedures exercises regulatory and proprietary control over public rights-of-way and municipally owned property, including regulation and operation of utilities. LF 9, A 2 (Petition, ¶ 2).

"RICHARD SHEETS ('Sheets') is the Deputy Director of the Missouri Municipal League, a resident of Cole County, State of Missouri and a taxpayer." LF 9, A 2 (Petition, ¶ 3).

Plaintiffs brought this action against the State of Missouri (the "State" hereinafter). They served the Attorney General as required by Rule 87.04 because the suit challenges the constitutionality of multiple Missouri statutes which SB 649 (2014) and SB 650 (2014) purport to enact. LF 9, A 2 (Petition, ¶¶ 4, 5).

Plaintiffs asserted that Springfield, MML member communities, and Richard Sheets individually as a taxpayer would be harmed by the laws which SB 649 (2014) and SB 650 (2014) purport to enact, in particular that these statutes are inconsistent with existing local ordinances, and grant third parties rights in "local governments' public right-of-way," and cause unfunded mandates, among other reasons. LF 10-11, 16, 21, A 3-4, 9, 14 (Petition, ¶¶ 11-13, 38, 52).

**Procedural history**

Plaintiffs and the State each filed motions for judgment on the pleadings. LF 3. The State's motion—styled "DEFENDANT'S AMENDED MOTION FOR JUDGMENT ON THE PLEADINGS IN PART AND TO DISMISS IN PART AND SUGGESTIONS IN SUPPORT—the State moved for judgment on the pleadings as to those challenges to

the manner of enacting SB 649 and SB 650, and moved to dismiss the substantive challenges on grounds "plaintiffs lack standing to assert any of them." LF 118.

Plaintiffs asserted a right to judgment based on the drafting of the text of SB 649 (2014) and SB 650 (2014) contrary to requirements Mo. Const. Art. III § 28 because each bill used the text of statutes which were held unconstitutional and invalid as the text of the existing law to be amended. LF 15-19, A 8-12.

On June 30, 2015, the trial court granted the State's motions and denied the plaintiffs' motion. LF 242, A 74.

Within 30 days the plaintiffs moved the trial court to reconsider and set aside or to amend its judgment, filing that post-judgment motion on July 29, 2015. LF 5. The trial court denied the motion within 90 days of its filing on October 19, 2015. LF 6. Plaintiffs filed their notice of appeal nine days later on October 28, 2015. LF 6-7.

## POINTS RELIED ON

POINT I

THE TRIAL COURT ERRED IN DISMISSING PLAINTIFFS' PETITION, THEREBY HOLDING THAT THE CITY OF SPRINGFIELD LACKS STANDING TO CHALLENGE—UNDER THE PROHIBITION AGAINST RETROSPECTIVE LAWS WITHIN MO. CONST. ART. I § 13—A STATUTE, MO. REV. STAT. § 67.1842.1(6), WHICH PURPORTS TO GRANT TO ANY…

> …PUBLIC UTILITY THAT HAS BEEN LEGALLY GRANTED ACCESS TO [A] POLITICAL SUBDIVISION'S RIGHT-OF-WAY…GENERAL ACCESS TO [AND] THE RIGHT TO REMAIN ON THE RIGHT-OF-WAY OF THE POLITICAL SUBDIVISION…[,]

BECAUSE THE TRIAL COURT THEREBY MISINTERPRETED THE LAW IN THAT A MISSOURI CITY HAS STANDING TO CHALLENGE LEGISLATION WHICH PURPORTS, AS DOES MO. REV. STAT. § 67.1842.1(6), TO RETROSPECTIVELY AND THEREFORE UNCONSTITUTIONALLY GRANT TO ANY PUBLIC UTILITY HAVING EXISTING ACCESS TO SPRINGFIELD'S RIGHT-OF-WAY—REGARDLESS OF HOW LIMITED SUCH ACCESS MAY BE IN DURATION, OR SCOPE—A NEW AND VESTED RIGHT OF PERMANENT AND GENERAL ACCESS.

*Planned Industrial Expansion Authority of City of St. Louis v. Southwestern Bell Telephone Company*, 612 S.W.2d 772 (Mo. 1981)

POINT II

THE TRIAL COURT ERRED IN DISMISSING PLAINTIFFS' PETITION, THEREBY HOLDING THAT THE CITY OF SPRINGFIELD LACKS STANDING TO CHALLENGE—UNDER THE SPECIAL LEGISLATION CLAUSE OF MO. CONST. ART. III § 40 (28)—A STATUTE, MO. REV. STAT. § 67.1842.1(6), WHICH STATES IN RELEVANT PART THAT…

> …NO POLITICAL SUBDIVISION SHALL…(6) REQUIRE ANY PUBLIC UTILITY THAT HAS BEEN LEGALLY GRANTED ACCESS TO THE POLITICAL SUBDIVISION'S RIGHT OF WAY TO ENTER INTO AN AGREEMENT OR OBTAIN A PERMIT FOR GENERAL ACCESS TO OR THE RIGHT TO REMAIN IN THE RIGHT-OF-WAY OF THE POLITICAL SUBDIVISION…[,]

BECAUSE THE TRIAL COURT THEREBY MISINTERPRETED THE LAW IN THAT A MISSOURI CITY HAS STANDING TO CHALLENGE LEGISLATION WHICH PURPORTS, AS DOES MO. REV. STAT. § 67.1842.1(6), TO GRANT TO THE CLOSED AND LIMITED CLASS OF PUBLIC UTILITY COMPANIES WITH EXISTING CITY RIGHT-OF-WAY ACCESS—REGARDLESS OF HOW LIMITED SUCH ACCESS MAY BE IN DURATION OR SCOPE—PERMANENT AND GENERAL CITY RIGHT OF WAY ACCESS.

*Planned Industrial Expansion Authority of City of St. Louis v. Southwestern Bell Telephone Company*, 612 S.W.2d 772 (Mo. 1981)

POINT III

THE TRIAL COURT ERRED IN DISMISSING PLAINTIFFS' PETITION, AND THEREBY HOLDING THAT MML LACKS STANDING TO CHALLENGE—UNDER THE PROHIBITION AGAINST RETROSPECTIVE LAWS WITHIN MO. CONST. ART. I, § 13, AND THE PROHIBITION AGAINST SPECIAL LAWS WITHIN MO. CONST. ART. III, § 40 (28)—A STATUTE, MO. REV. STAT. § 67.1842.1(6), BECAUSE THE TRIAL COURT THEREBY MISINTERPRETED THE LAW IN THAT THE PLEADED FACTS ALLEGED BY MML ESTABLISH THE LEGAL BASIS FOR STANDING, *I.E.*, (1) ITS MEMBERS SEPARATELY WOULD HAVE STANDING; (2) THE MEMBERSHIP INTERESTS MML SEEKS TO PROTECT ARE GERMANE TO MML'S PURPOSE; AND (3) BECAUSE OF THE PROSEPCTIVE NATURE OF DECLARATORY RELIEF SOUGHT BY MML, PARTICIPATION BY ITS MEMBERS INDIVIDUALLY IS NOT REQUIRED.

*St. Louis Association of Realtors v. City of Ferguson*, 354 S.W.3d 620 (Mo. banc 2011)

POINT IV

THE TRIAL COURT ERRED IN GRANTING JUDGMENT ON THE PLEADINGS FOR THE RESPONDENT, THEREBY DENYING THE PLAINTIFFS' CHALLENGE—UNDER MO. CONST. ART. III § 28—TO THE ENACTMENT OF TWO BILLS IN THE 2014 SESSION OF THE MISSOURI GENERAL ASSEMBLY, SB 649 AND SB 650, BECAUSE THE TRIAL COURT THEREBY MISAPPLIED THE LAW IN THAT BOTH BILLS EITHER ENACTED, REENACTED OR REVIVED PRIOR INVALID LEGISLATION AND FAILED AS THE CONSTITUTION REQUIRES IN SO DOING TO "SET FORTH AT LENGTH AS IF IT WERE A NEW ACT" THE "ACT OR SECTION TO BE AMENDED," AS THE SECTIONS TO BE AMENDED AS IN EFFECT DURING THE TIME OF ENACTMENT FOR BOTH BILLS IN 2014.

Mo. Const. Art. III, § 28

*State ex rel. SSM Health Care St. Louis v. Neill*, 78 S.W.3d 140 (Mo. 2002).

*Washington Citizens Action of Washington v. State of Washington*, 171 P.3d 486 (Wash. 2007)

POINT V

THE TRIAL COURT ERRED IN DISMISSING PLAINTIFFS' PETITION, THEREBY HOLDING THAT SHEETS LACKS STANDING TO CHALLENGE—UNDER MO. CONST. ART. X § 23 (THE "HANCOCK AMENDMENT")—THE STATUTES ENACTED BY SB 649 AND SB 650 BECAUSE THE TRIAL COURT THEREBY MISAPPLIED THE LAW IN THAT SHEETS HAS STANDING AS A RESIDENT AND TAXPAYER OF A POLITICAL SUBDIVISION AND BODY OF LOCAL GOVERNMENT, COLE COUNTY, BECAUSE COLE COUNTY IS ADVERSELY IMPACTED FINANCIALLY BY THE REQUIREMENTS IMPOSED BY THESE LAWS AND THE STATE DOES NOT PROVIDE THE FUNDING AND RESOURCES FOR COLE COUNTY AND ALL OTHER IMPACTED POLITICAL SUBDIVISIONS TO COMPLY WITH THESE MANDATES.

Mo. Const. Art. X, § 23

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

## ARGUMENT

### POINT I

THE TRIAL COURT ERRED IN DISMISSING PLAINTIFFS' PETITION, THEREBY HOLDING THAT THE CITY OF SPRINGFIELD LACKS STANDING TO CHALLENGE—UNDER THE PROHIBITION AGAINST RETROSPECTIVE LAWS WITHIN MO. CONST. ART. I § 13—A STATUTE, MO. REV. STAT. § 67.1842.1(6), WHICH PURPORTS TO GRANT TO ANY…

> …PUBLIC UTILITY THAT HAS BEEN LEGALLY GRANTED ACCESS TO [A] POLITICAL SUBDIVISION'S RIGHT-OF-WAY…GENERAL ACCESS TO [AND] THE RIGHT TO REMAIN ON THE RIGHT-OF-WAY OF THE POLITICAL SUBDIVISION…[,]

BECAUSE THE TRIAL COURT THEREBY MISINTERPRETED THE LAW IN THAT A MISSOURI CITY HAS STANDING TO CHALLENGE LEGISLATION WHICH PURPORTS, AS DOES MO. REV. STAT. § 67.1842.1(6), TO RETROSPECTIVELY AND THEREFORE UNCONSTITUTIONALLY GRANT TO ANY PUBLIC UTILITY HAVING EXISTING ACCESS TO SPRINGFIELD'S RIGHT-OF-WAY—REGARDLESS OF HOW LIMITED SUCH ACCESS MAY BE IN DURATION, OR SCOPE—A NEW AND VESTED RIGHT OF PERMANENT AND GENERAL ACCESS.

Mo. Const. Art. I § 13 states "That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be enacted."

The trial court erroneously held that Springfield lacks standing to challenge Section 67.1842.1(6) on grounds that it violates the prohibition against retroactive laws in Art. 1 § 13. See LF 248-49, A 80-81 (Judgment, p. 7-8, § II.3). In so ruling the trial court relied upon *Savanah R-III School District v. Public School Retirement System of Missouri*, 950 S.W.2d 854 (Mo. banc 1997), for the proposition that political subdivisions including Missouri cities lack standing to assert a "retroactive law" challenge to legislation passed by the Missouri General Assembly.

*Savanah R-III* (a case construing statutes and regulations governing contributions to the public school retirement system) is not controlling on the question of whether a Missouri city has standing to challenge legislation rights in municipal right-of-way to others. In a case directly on point, *Planned Industrial Expansion Authority of City of St. Louis v. Southwestern Bell Telephone Company*, 612 S.W.2d 772, 776 (Mo. 1981), this Court ruled that a city has standing to challenge, on retroactivity grounds, legislation granting or expanding rights of permissive city right-of-way users.

*Planned Industrial* has not been overruled. It remains controlling and requires that the trial court's ruling on standing be reversed.

A. THE STANDARD OF REVIEW

"Standing is a question of law, which is reviewed *de novo.*" *St. Louis Association of Realtors v. City of Ferguson*, 354 S.W.3d 620, 622 (Mo. banc 2011). The Court reviews *de novo* orders of dismissal on grounds of standing. *Lynch v. Lynch*, 260 S.W.3d 834, 836 (Mo. banc 2008).

B. SPRINGFIELD HAS STANDING BECAUSE SECTION 67.1842.1(6), AS ENACTED BY SB 649, HARMS SPRINGFIELD AND ITS RESIDENTS BY GRANTING VESTED RIGHTS TO PUBLIC UTILITIES AND THEREBY PREVENTING SPRINGFIELD FROM EFFECTIVELY MANAGING ITS PUBLIC RIGHT-OF-WAY

Standing to assert a right to declaratory judgment—as Springfield does here—"require[s] that the plaintiff have a legally protectable interest at stake in the outcome of the litigation." *Ste. Genevieve School District, R II v. Board of Aldermen of City of Ste. Genevieve*, 66 S.W.3d 6, 10 (Mo. banc 2002). (citing *Battlefield Fire Protection District v. City of Springfield,* 941 S.W.2d 491, 492 (Mo. banc 1997)). "A legally protectable interest exists if the plaintiff is directly and adversely affected by the action in question." *Id.*

In 2014 the General Assembly purported to enact, by passing SB 649, an amendment to 67.1842.1, adding subsection (6), which states:

> In managing the public right-of-way and in imposing fees pursuant to sections 67.1830 to 67.1846, no political subdivision shall…
>
> (6) Require any public utility that has legally been granted access to the political subdivision's right-of-way to enter into an agreement or obtain a permit for general access to or the right to remain in the right-of-way of the political subdivision.

Section 67.1842.1(6).

### 1. Prejudice

As enacted, Section 67.1842.1(6) grants "public utilities" a right of "general access" to and the "right to remain" on municipal right-of-way on which any public utility had prior lawful access.

A "public utility" is defined by Section 67.1830(9). The term means every organization transmitting "substances, data, or electronic or electrical current or impulses," through all types of "pipes, cables, conduits, wires, [and] optical cables." *Id.*[3]

The term "general access" is not defined. There is no helpful definition found in caselaw. "Absent a definition provided in the statute, the court must follow the plain and ordinary meaning of the words themselves." *Ste. Genevieve School District, R II*, 66 S.W.3d at 11. The breadth of the term "general access" has no practical limit. It contemplates no restrictions on what a public utility may do while exercising this newly-expanded right. This same subsection then takes away Springfield's ability to exercise permitting authority and contractual ability to manage competing interests and its own uses of right-of-way. In a city such as Springfield, right-of-way includes city streets,

[3] While using the broad and generic term "public utilities" to describe the beneficiaries of the grants in the legislation, the primary beneficiaries are private for profit entities. More particularly, this legislation is unapologetically in place to help the small number of existing large telecommunications companies which are already permissively using public right of way—such as the proposed intervenors in this case—regardless of the impact on cities and counties, their residents, and other public right-of-way users.

sidewalks, storm-water drainage structures and space used by municipal utilities, to name only some of the City's needs. With one stroke the General Assembly elevated the property interests of public utilities onto a plane with and into a position above any municipal right-of-way owner.

Finally, Section 67.1842.1(6) creates an indefeasible right of general access in those public utilities with any existing access at all. The statute does this by conferring an additional right—the "right to remain" on public right-of-way—upon any public utility exercising their newly-created right of "general access."

**2. SB 649 (2014) adds a new verse to an old and previously heard song**

Section 67.1842.1(6), as enacted by SB 649, differs little from the legislation successfully challenged in *Planned Industrial*. The class of right-of-way users was smaller in *Planned Industrial*—"telephone or telegraph" companies, not all "public utilities"—but the rights conferred by the challenged legislation, and the resulting constitutional defect, are the same.

In *Planned Industrial*, the amendment purported to grant vested rights in city right-of-way to companies which had gained permissive access. In relevant part the statute being construed, Section 392.080 as amended, stated:

> …any telegraph or telephone company desiring to place their wires, poles, and other fixtures in any city, [] shall first obtain consent from said city through the municipal authorities thereof; (The 1974 amendment added the following language:) and provided, further, that the acceptance, use, or continued use of this right shall create a real property public easement in the public roads, streets and

> waters in favor of the accepting telephone or magnetic telegraph company…and such easement shall not terminate or be extinguished by any vacation, abandonment or subsequent sale by the state or any agency or commission thereof…

*Id.* at 774-75 (parenthetical in original). Summarizing that legislation, and the City of St. Louis's position thusly, the Court said: "the effect of the amendment is to convert the permissive use…into a permanent use," which "the City asserts is violative of § 13 of Article I." *Id.* at 776.

The Court found that the City of St. Louis had standing to assert its challenge to the amendment by seeking a declaratory judgment, *id.* at 776, just as Springfield here asserts its challenge by declaratory judgment to Section 67.1842.1(6). In holding that St. Louis had standing to challenge the amendment by declaratory judgment, Justice Morgan said:

> …it cannot be argued tenably that the effect of permanently fixing property rights in the vast majority of the hundreds of miles of streets lying within the City does not result in a "substantial prejudice" to the City or its many citizens. The City has the important and indispensable duty to govern the use of its streets, and alleys, in such a manner as to serve the welfare of the public.

*Id.* at 776. All Justices joined in the opinion or concurred as to the holding.

*Savanah R-III* states in broad terms that Missouri political subdivision have no standing to challenge state legislation on constitutional grounds. The strongest argument for limiting *Savanah R-III* to the facts and the issue presented was penned by Justice

Robertson in dissent: "there is no logical firewall that prohibits the majority's holding from extending to cities and counties." *Savanah R-III*, at 861. Beyond that reason Justice Robertson objected substantively because the result—denying standing to political subdivisions—would render legislation impacting local government practically if not absolutely unreviewable. *Id.*

Justice Robertson's dissent was joined by Justice Limbaugh, leaving Justice Holstein's majority opinion to be joined by one other member of the Court and two special judges. The remaining Court member, Justice Price, took the middle ground and concurred only in the result. *Id.* at 860.

*Savanah R-III* conflicts with at least one other case decided by this Court, *School District of Riverview Gardens v. St. Louis County*, 816 S.W.2d 219 (Mo. banc 1991). In *Riverview Gardens*, the plaintiff and successful appellant was a school district and therefore "a political subdivision of the State of Missouri." *Id.* at 220. The District brought a special law challenge to procedures for adjusting *ad valorem* taxes in St. Louis City and St. Louis County. *Id.* The concurring opinion filed in *Riverview Gardens* makes clear that the Court considered and found standing: "[i]t would appear Riverview Gardens has standing on the special legislation issue." *Id.* at 226 (concurring opinion of Lowenstein, Special Judge).

The language within *Savanah R-III*, which the trial court cited in support of its standing rulings, is dicta. To decide *Savanah R-III* it was only necessary to decide that school districts lack standing to challenge legislation governing contributions to the

teacher retirement system. Broad proclamations about political subdivisions in general were not necessary to resolve *Savanah R-III*.

As Justice Robertson presciently feared in writing his dissent, dicta from *Savanah R-III* could be applied some day to an issue which was not then before the Court. Here that issue to which the trial court erroneously applied *Savanah R-III* is this: whether a Missouri city has standing to challenge legislation impacting a city's rights and obligations in city right-of-way. That issue was squarely decided on its merits in *Planned Industrial*, which therefore remains controlling notwithstanding dicta from *Savanah R-III*.

Springfield is a constitutional charter city. LF 9, A 2 (Petition, ¶2). Springfield is entrusted by its citizens with managing City assets including right-of-way. The trial court's ruling strips away Springfield's authority to discharge that duty to its citizens. Granting standing to Springfield is the only way of protecting Springfield's citizens' rights.

B. CONCLUSION OF POINT

The trial Court's judgment finding Springfield lacks standing to challenge Section 67.1842.1(6), as enacted by SB 649, should be reversed. This Court should hold that Springfield has standing to challenge this legislation under Mo. Const. Art. 1 §13.

## POINT II

THE TRIAL COURT ERRED IN DISMISSING PLAINTIFFS' PETITION, THEREBY HOLDING THAT THE CITY OF SPRINGFIELD LACKS STANDING TO CHALLENGE—UNDER THE SPECIAL LEGISLATION CLAUSE OF MO. CONST.

ART. III § 40 (28)—A STATUTE, MO. REV. STAT. § 67.1842.1(6), WHICH STATES IN RELEVANT PART THAT…

> …NO POLITICAL SUBDIVISION SHALL…(6) REQUIRE ANY PUBLIC UTILITY THAT HAS BEEN LEGALLY GRANTED ACCESS TO THE POLITICAL SUBDIVISION'S RIGHT OF WAY TO ENTER INTO AN AGREEMENT OR OBTAIN A PERMIT FOR GENERAL ACCESS TO OR THE RIGHT TO REMAIN IN THE RIGHT-OF-WAY OF THE POLITICAL SUBDIVISION…[,]

BECAUSE THE TRIAL COURT THEREBY MISINTERPRETED THE LAW IN THAT A MISSOURI CITY HAS STANDING TO CHALLENGE LEGISLATION WHICH PURPORTS, AS DOES MO. REV. STAT. § 67.1842.1(6), TO GRANT TO ACCESS THE CLOSED AND LIMITED CLASS OF PUBLIC UTILITY COMPANIES WITH EXISTING CITY RIGHT-OF-WAY ACCESS—REGARDLESS OF HOW LIMITED SUCH ACCESS MAY BE IN DURATION OR SCOPE—PERMANENT AND GENERAL CITY RIGHT OF WAY ACCESS.

Section 67.1842.1(6) grants the right of "general access" and the "right to remain" on right-of-way owned by Missouri cities to a limited and closed class consisting of "any public utility that has been legally granted access" (emphasis added). A public utility without prior lawful access gains no benefit at all from this statute and a city may require permitting and require contracts as conditions to access. Section 67.1942.1(6) is therefore an unconstitutional special law which exempts the existing public utilities on

city right-of-way from permitting requirements and from having to renew the agreements whereby they gained access.

Mo. Const. Art. III § 40 (28) states that: "The general assembly shall not pass any local or special law…(28) granting to any corporation, association or individual any special or exclusive right, privilege or immunity…."

> Springfield and the MML prayed in their petition that the trial court:
>
> Declare Section 67.1842.1(6) as enacted by SB 649 to be an unconstitutional special law that grants special privileges and benefits to public utilities that "ha[ve] legally been granted access to the political subdivision's right-of-way" without substantial justification in violation of Article III, Section 40(28) of the Missouri Constitution.

LF 18, A 11 (Petition, p. 11).

The trial court granted the State's "motion to dismiss any 'special law' claim" asserted by plaintiffs. LF 251; A 83 (Judgment, p. 10 ¶ II.6). This standing issue is also controlled by *Planned Industrial Expansion Authority of City of St. Louis v. Southwestern Bell Telephone Company*, 612 S.W.2d 772 (Mo. 1981), and the trial court's ruling that Springfield lacks standing to assert a "special law" challenge must be reversed for the reasons discussed in POINT I.

A. THE STANDARD OF REVIEW

The standard of review is *de novo.* See the authorities discussed in POINT I, section A, at page 15 of this brief.

B. SPRINGFIELD HAS STANDING TO CHALLENGE SECTION 67.1842.1(6) ON GROUNDS THAT IT IS AN UNCONSTITUTIONAL "SPECIAL LAW" FOR THE SAME REASON IT HAS STANDING TO MAKE A "RETROSPECTIVE LAW" CHALLENGE TO THE SAME STATUTE

What Springfield has to say here about standing to assert a special law challenge is identical to its discussion in POINT I. The controlling case discussed in POINT I, *Planned Industrial,* also holds that the legislation challenged in that case was a special law which violated Mo. Const. Art. III § 40 (28). *Planned Industrial,* 612 S.W.2d at 777 ("There appears to be no reasonable constitutional basis for granting a permanent easement to a telecommunications company while not creating a similar vested easement for electric, water or other utility companies"). See also *School District of Riverview Gardens,* 816 S.W.2d at 226 (concurring opinion noting that the majority "apparently" found that a school district had standing to assert a special law challenge under Mo. Const. Art. III § 40 (30)).

The legal interest a Missouri city has in municipal right-of-way which gives standing to assert a retrospective law challenge is the same interest which gives standing to assert a special law challenge to the same legislation.

Legislation which benefits a closed class is presumptively invalid, absent substantial justification. *Union Elec. Co. v. Mexico Plastic Co.,* 973 S.W.2d 170, 174 (Mo. App., E.D. 1998).

> Classifications based upon factors subject to change may be open-ended and do not implicate the constitutional prohibition…[c]lassifications based upon historical facts and similar immutable factors are closed-ended and, therefore, facially special laws. The unconstitutionality of such closed-ended classifications is presumed. The party defending the facially special law must then demonstrate a substantial justification for the closed-ended classification lest the law be struck down as unconstitutional.

*Id.* (citations omitted).

Section 67.1842.1(6) suffers from a different narrowness defect than the legislation in *Planned Industrial*. There the legislation benefitted only some utility providers—telephone and telegraph companies.

Here, Section 67.1842.1(6) applies to only those public utilities which had lawful access at the time of enactment. That class of public utilities is closed because it is limited to those having historic and legally granted permission to use local government right of way at the time of enactment. All other public utilities are subject to municipal permitting requirements and may be required to enter into contracts setting out terms and conditions of access.

Not only does this statute tie the city's regulatory hands as to existing public utility right-of-way users, but it gives an anti-competitive advantage to public utilities with existing right-of-way access over those which do not have access. It thereby puts the innovators and entrepreneurs yet to come in the position of muscling for space and market share with those who are literally and figuratively entrenched. This statute

elevates the rights of those utilities with historic but limited rights above the City and into a position of near monopoly power to charge other utilities for capacity on their infrastructure.

However, the foregoing analysis and supporting evidence is properly developed in the trial court on remand. For now, it is proper to reverse the trial court's judgment finding lack of standing and remand for further proceedings.

C. CONCLUSION OF POINT

For all of the reasons explained by Springfield in POINT I, Springfield has standing to assert a challenge to Section 67.1842.1(6) under Mo. Const. Art. III § 40 (28). The trial court judgment holding otherwise should be reversed and the case remanded to determine all remaining issues essential to Springfield's special law challenge.

POINT III

THE TRIAL COURT ERRED IN DISMISSING PLAINTIFFS' PETITION, AND THEREBY HOLDING THAT MML LACKS STANDING TO CHALLENGE—UNDER THE PROHIBITION AGAINST RETROSPECTIVE LAWS WITHIN MO. CONST. ART. I, § 13, AND THE PROHIBITION AGAINST SPECIAL LAWS WITHIN MO. CONST. ART. III, § 40 (28)—A STATUTE, MO. REV. STAT. § 67.1842.1(6), BECAUSE THE TRIAL COURT THEREBY MISINTERPRETED THE LAW IN THAT THE PLEADED FACTS ALLEGED BY MML ESTABLISH THE LEGAL BASIS FOR STANDING, *I.E.*, (1) ITS MEMBERS SEPARATELY WOULD HAVE STANDING; (2) THE MEMBERSHIP INTERESTS MML SEEKS TO PROTECT ARE GERMANE TO MML'S PURPOSE; AND (3) BECAUSE OF THE

PROSEPCTIVE NATURE OF DECLARATORY RELIEF SOUGHT BY MML, PARTICIPATION BY ITS MEMBERS INDIVIDUALLY IS NOT REQUIRED.

MML asserts standing as an association of Missouri cities to challenge the 2014 amendments which SB 649 made to Section 67.1842.1 by adding subsection 6. LF 9-10, A 2-3, (Petition, ¶¶ 1, 9). The trial court erred in ruling otherwise and the judgment dismissing MML should be reversed.

A. THE STANDARD OF REVIEW

The standard of review is *de novo*. See the authorities discussed in POINT I, section A, at page 15 of this brief.

B. MML MEETS ALL OF THE REQUIREMENTS FOR ASSOCIATION STANDING

The elements of standing by an association to bring suit for declaratory judgment on behalf of its membership are these:

> (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

*St. Louis Association of Realtors*, 354 S.W.3d at 623.

**1. MML members have standing**

No doubt the trial court entered judgment on standing against MML because it found Springfield lacked standing. However Springfield explains in POINT I and POINT II why the trial court erred in finding it lacks standing. Establishing that

Springfield has standing establishes the first element of association standing—the right of members to sue on their own. MML does not restate any part of Springfield's arguments in POINT I or POINT II but incorporates all of Springfield's supporting argument and authorities by this reference for brevity.

**2. The interest MML seeks to protect is germane to its purpose**

"MML's purpose includes advocating for fair and reasonable regulations of Missouri municipalities and opposing legislation that is harmful to Missouri municipalities." LF 10, A 3 (Petition ¶ 9).

This meets the germaneness element, which is a light burden, particularly so here at the pleadings stage of this case. "[T]the germaneness requirement is undemanding…[t]he issue an association is litigating does not, for instance, need to be *central* to the organization's purpose." *Id.* at 625 (citations omitted, emphasis in original). If pressed to present evidence establishing that the objectives of this litigation are germane to its purposes, MML can do that by a variety of means, including proof of its organic documents (bylaws), board resolutions, and even its history of activity on similar issues. *Id.* at 626-27.

In *St. Louis Association of Realtors,* this Court held that the association had standing to bring a declaratory judgment challenging a municipal ordinance which "created a regulatory fee and licensing system for owners of residential property within Ferguson who lease or rent their property to others." *Id.* at 622. In explaining, the Court said:

> [T]he association's objective in the current litigation is to challenge what it alleges is an unlawful infringement by Ferguson on the property ownership rights of a number of its members. Because the association has demonstrated a clear interest in protecting private property rights, the issue being litigated is plainly germane to the organization's purpose.

*Id.* at 627.

Here, MML joins Springfield in asserting that Section 67.1842.1(6) negatively impacts the interests of its members in the right-of-way which each member manages and regulates for a number of public purposes. This meets the germaneness requirement for association standing at this stage of the proceedings.

**3. MML seeks no relief which requires participation of members**

Association standing is determined by the nature of the relief sought. MML joins in bringing this declaratory judgment action challenging the constitutionality of legislation. "[R]equests made by an association for prospective relief generally do not require the individual participation of the organization's members." *Id.* at 624. In holding that an action for declaratory judgment was properly brought by an association in furtherance of membership interests, this Court said: "the association merely seeks prospective relief in the form of a declaratory judgment that [an] ordinance is invalid…[i]t has not pressed for damages or other relief that would require joinder of individual association members." *Id.* at 625.

There is no need to join more member cities to provide all of the relief MML seeks.

C. CONCLUSION OF POINT

MML has pleaded all essential facts to establish grounds for association standing. The trial court's judgment dismissing the MML on standing grounds should therefore be reversed.

POINT IV

THE TRIAL COURT ERRED IN GRANTING JUDGMENT ON THE PLEADINGS FOR THE RESPONDENT, THEREBY DENYING THE PLAINTIFFS' CHALLENGE—UNDER MO. CONST. ART. III § 28—TO THE ENACTMENT OF TWO BILLS IN THE 2014 SESSION OF THE MISSOURI GENERAL ASSEMBLY, SB 649 AND SB 650, BECAUSE THE TRIAL COURT THEREBY MISAPPLIED THE LAW IN THAT BOTH BILLS EITHER ENACTED, REENACTED OR REVIVED PRIOR INVALID LEGISLATION AND FAILED AS THE CONSTITUTION REQUIRES IN SO DOING TO "SET FORTH AT LENGTH AS IF IT WERE A NEW ACT" THE "ACT OR SECTION TO BE AMENDED," AS THE SECTIONS TO BE AMENDED AS IN EFFECT DURING THE TIME OF ENACTMENT FOR BOTH BILLS IN 2014.

The actions of the General Assembly in passing SB 649 and SB 650 in 2014 are and can only be a new enactment, or a reenactment or revival of the statutes which were held to have been unconstitutionally enacted in 2013 by the judgment of the Cole County circuit court in the *Liberty* case. LF 33, A 26.

Once the circuit court entered judgment holding the statutes enacted or amended by HB 331 and HB 345 were invalid, each became a nullity[4]. The effect of that judgment invaliding these two bills is to reinstate the prior sections repealed by each. That is because "the repealing clause is likewise invalid and the old section[s] remain[] in force." *State ex rel. SSM Health Care St. Louis v. Neill*, 78 S.W.3d 140, 143 (Mo. 2002)(citations and internal quotes omitted).

When legislation is held to be invalid and the Revised Statutes of Missouri or V.A.M.S. incorrectly continues to show the invalid sections as if they remained in effect, these law sources must be disregarded and the immediately preceding "version of the

[4] On August 28, 2014, this Court's docket sheet, in the *City of Liberty* appeal, Case No. SC93799 (of which this Court may take notice), states: "ORDER ISSUED: APPELLANT'S MOTION TO DISMISS SUSTAINED AND CAUSE DISMISSED. APPELLANT'S MOTION TO REMAND WITH DIRECTIONS TO VACATE OVERRULED. MANDATE SENT TO THE CIRCUIT CLERK OF COLE COUNTY." Thus, not only did this Court leave undisturbed the underlying circuit court judgement invalidating HB 331 and HB 345 in *City of Liberty*, but the Court denied the State's motion to remand for the circuit court to do so. That disposes of any contention whatsoever that the circuit court judgment was inoperative at any time as far as holding the legislation passed in HB 331 and HB 345 to be unconstitutional and invalid.

revised statutes, or the Historical and Statutory Notes section of …V.A.M.S., should be referred to." *Id.* [5]

Here the drafters of SB 649 and SB 650 chose to ignore the circuit court decision holding HB 331 and HB 345 to be unconstitutional and invalid. They used the language appearing in the revised statutes showing the changes made by each 2013 bill, as if the changes made by HB 331 and HB 345 remained in effect notwithstanding the judgment invalidating them. That violates Mo. Const. Art. III § 28, which states:

> No act shall be revived or reenacted unless it shall be set forth at length as if it were an original act. No act shall be amended by providing that words be stricken out or inserted, but the words to be stricken out, or the words to be inserted, or the words to be stricken out and those inserted in lieu thereof, together with the act or section amended, shall be set forth in full as amended.

Mo. Const. Art. III § 28 ("Form of reviving, reenacting and amending bills").

A. THE STANDARD OF REVIEW

The trial court granted the State's motion for judgment on the pleadings as to the plaintiffs' challenge under Art. III § 28. LF 246, A 78. Judgment on the pleadings is reviewed *de novo* to determine whether the pleaded facts are sufficient as a matter of law to show a basis for relief. *Eaton v. Mallinckrodt, Inc.*, 224 S.W.3d 596, 600 (Mo. banc

[5] The version of Section 67.1842 from V.A.M.S, as attached in the appendix, still shows that this section is unconstitutional because of the 2013 Cole County circuit court decision. See A 87.

2007). However, "laws enacted by the legislature and approved by the governor have a strong presumption of constitutionality." *Jackson County Sports Complex Auth. v. State*, 226 S.W.3d 156, 160 (Mo. banc 2007). As challengers, plaintiffs have the burden to "clearly and undoubtedly" establish that SB 649 and SB 650 were passed contrary to a limitation imposed by § 28. *C.C. Dillon Co. v. City of Eureka*, 12 S.W.3d 322, 327 (Mo. banc 2000)(citations omitted).

Here, the City of Springfield and MML welcome that burden and explain how the trial court erred in ruling that they failed to meet it.

B. DISCUSSION

**1. "No act shall be revived or reenacted unless it shall be set forth at length as if it were an original act."**

The statutes newly enacted and amendments made by HB 331 and HB 345 in 2013—including but not limited to adding subsection 6 to Section 67.1842.1 as discussed above in POINT I and POINT II—were not and never did become law. They were declared to be "invalid, unenforceable, and unconstitutional and of no force and effect in [their] entirety" by a circuit court judgment of October 17, 2013, thereby making final a preliminary injunction entered on August 27, 2013[6]. LF 33, A 26. There never was a decision of this or any other court vacating or altering that circuit court decision from October, 2013.

[6] Lacking an emergency clause, HB 331 and HB 345 would have taken effect on August 28, 2013.

Missouri trial court orders granting injunctions which are prohibitory are final unless and until reversed or modified. See *State ex rel. Attorney General of Missouri v. Shull*, 887 S.W.2d 397, 402-403 (Mo. banc 1994). The act of taking an appeal "from a final decree granting an injunction—which does not affirmatively command something to be done, but which restrains the commission of an act or acts—does not have the effect of dissolving the injunction or suspending the operation of the decree, pending the appeal." *State ex rel. Gray v. Hennings*, 185 S.W. 1153, 1154 (Mo. App., St. L., 1916).

The statutes enacted and amended by HB 331 and HB 345 in 2013 therefore occupied the same legal status as if the legislature itself had expressly repealed them. That is because "[a]n unconstitutional statute is no law and confers no rights." *Trout v. State*, 231 S.W.3d 140, 148 (Mo. banc 2007). "This is true from the date of its enactment, and not merely from the date of the decision so branding it." *Id.* However, here the preliminary injunction predated the effective date of HB 331 and HB 345, and the final judgment invalidating both was entered on October 17, 2013, predated the filing of SB 649 and SB 650 (January 8, 2014) by nearly three months. LF 11-13, A 4-6 (Petition, ¶¶ 14, 15, 19, 24).

Thus, the statutes repealed by the invalid legislative acts in 2013 (HB 331 and HB 345) were reinstated by operation of law just as if the failed legislation had never been introduced. *State ex rel. SSM Health Care St. Louis*, 78 S.W.3d at 143; C.D. Sands [Sutherland's] *Statutes and Statutory Construction* § 2.07 (4th ed., 1972) ("A decision holding a statutory provision invalid has the effect of reactivating a prior statute which the invalid act had displaced."). See also

*Maricopa County v. Kinko's Inc.*, 56 P.3d 70, 74-75 (Ariz. App. 2002)(when amending legislation is held invalid, "the prior version of the amending statute is automatically reinstated by operation of law.").

Because the changes made by HB 331 and HB 345 in 2013 were legally ineffective for any purpose once the Cole County circuit court so ruled, all the legislature could constitutionally do in 2014 was proceed with SB 649 and SB 650 as if they were passing as new legislation the same laws and amendments which HB 331 and HB 345 were intended to pass. To have done that constitutionally in 2014 would have required using the same bold-faced type on the same language passed the year before in HB 331 and HB 345, to reflect that SB 649 and SB 650 were each introduced and passed "as if it were an original act," which in fact both were.

But that is not how the legislature wrote SB 649 and SB 650, and that is why the bills were unconstitutionally misleading.

**2. SB 649 and SB 650 were misleading**

What the sponsors did instead of proceeding as if SB 649 and SB 650 were enacting new laws was to draft them so as to give the false appearance to the rest of the General Assembly, and to all interested citizens, the press, and groups (such as the membership of MML), that each bill did nothing more than make technical and minor changes of a few words here and there to existing law. In fact the drafters of SB 649 and SB 650 passed off the invalid language from HB 331 and HB 345 as existing law in drafting the 2014 bills.

Even the staff members responsible for preparing bill summaries were fooled, or complicit. The bill summary for SB 649 explains the effect of the proposed legislation on existing law thusly:

> Currently, no political subdivision shall require any public utility granted right-of-way access prior to August 28, 2001 to enter into an agreement or obtain a permit for general access to remain in the right-of-way. This act removes this date and allows any public utility that has been granted right-of-way access to remain in the right-of-way without entering into an agreement or obtaining a permit for general access.

LF 205-06 (emphasis added). Never did a Missouri statute grant any public utility exemption from satisfying local right-of-way permitting requirements or grant general access and right to remain on local government right-of-way. That is what the General Assembly attempted to accomplish by enacting Section 67.1842.1(6) in HB 331, which failed when the Cole County circuit court held that HB 331 was invalid.

But the reader of that summary and the reader of SB 649 would conclude something much different because all this bill did on its face was make a date amendment which would appear at most to enlarge the class of public utilities benefitting from an existing grant of rights and an existing permitting exemption. Only a reader of SB 649 in 2014 who was aware that HB 331 and its change to Section 67.1842 had been held to be invalid in 2013 would not be deceived about the scope of substantive change made by SB 649.

The same is true of the Sections 67.5096, 5098, and 5100. In the 2013 session the legislature unlawfully—it turns out—enacted sweeping changes in the administrative permitting and review process for wireless infrastructure by enacting these Sections in HB 331. When introduced and passed in 2014, SB 650 showed these invalid 2013 changes to be the current law which SB 650 was introduced to amend by changing just a few inconsequential words in each section. For example, Section 67.5096.6, within SB 650 is worded thusly:

> A party aggrieved by the final action of an authority, either by its affirmatively denying an application under the provision of this section or by its inaction, may bring an action for review in any court of competent jurisdiction **within this state**.

LF 84, A 65 (SB 650, p. 7, bold in original). Whereas HB 331 attempted to enact all of the language not shown in bold—which would have been the law but for the 2013 Cole County declaratory judgment and injunction—SB 650 purports to add three words which limit judicial review of local permitting decisions to courts "within this state" (as if a court in some other state or sovereign nation might conceivably have jurisdiction in the absence of this language).

As with SB 649, the Senate bill summary for SB 650 glosses over the fact that "currently" (at the time of filing and enactment) the law was not as it would have been had HB 331 gone into effect. Without HB 331, such decisions and review of such decisions is governed by a series of statutes applicable to local

zoning, see e.g. *Highlands Homes Association v. Board of Adjustment*, 306 S.W.3d 561 (Mo. App., W.D. 2009), with venue provisions contained in each.

Sections 67.5096, 5098, and 5100 were declared unconstitutional as enacted by HB 331; and thus, language purporting to grant venue for review in "any court of competent jurisdiction" was as ineffective as if it had never been introduced in 2013. But according to the bill summary for SB 650…

> This act modifies the Uniform Wireless Communications Infrastructure Deployment Act. Currently, parties aggrieved…may bring an action for review in any court of competent jurisdiction. This act requires that the court be in this state.

LF 207. This would impart belief as to the current law in the mind of one who did not know that HB 331 and the 2013 enactment of Sections 67.5096, 5098, and 5100 were previously held to be unconstitutional and invalid.

All but those "in the know" would have been misled by the drafting of SB 649 and SB 650 into believing that each made minor and highly technical changes to a body of established law. That is precisely what Art. III § 28 was put in the Constitution to prevent.

**3. How <u>not</u> to fix a law once it is declared unconstitutional**

The leading Missouri case addressing Art. III § 28 is *C.C. Dillon Co. v. City of Eureka*, 12 S.W.3d 322 (Mo. banc 2000). *C.C. Dillon* does not address the question here presented: how to reenact a law once it has been declared that it was unconstitutionally enacted the first time. However, the *C.C. Dillon* Court cited with approval and relied on

authority from the State of Washington, *Flanders v. Morris*, 558 P.2d 769 (Wash 1977), because Washington's Constitution has a provision similar to Missouri's Art. III § 28. See Wash. Const. Art. II § 37[7].

In *Flanders*, the Court explained a crucial function these two similar constitutional provisions serve:

> Another important purpose of Const. art 2, s 37…is the necessity of insuring that legislators are aware of the nature and content of the law which is being amended and the effect of the amendment upon it. 1A Sutherland, Statutory Construction, s 22.16.

558 P.2d at 773. It is not enough for transparency in the legislative process to know only what the law would be if a bill passes. To comply with Art. III § 28 the bill must identify the law being changed as it currently and in fact exists at the time of amendment. SB 649 and SB 650 totally fail in this.

Thirty years after *Flanders*, the Washington Supreme Court again explained the importance of setting out the existing law in proposed legislation, and struck down a law

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[7] In its entirety, Article II, § 37 of the Washington Constitution, states:

> **37 Revision or Amendment**
>
> No act shall ever be revised or amended by mere reference to its title, but the act revised or the section amended shall be set forth at full length.

Wash. Const. Article II § 37.

for the same reasons Springfield and the MML here assert. *Washington Citizens Action of Washington v. State of Washington*, 171 P.3d 486 (Wash. 2007).

While an injunction was in effect against the enforcement of a law passed by citizen initiative, a second petition was circulated and put to vote to amend that law as it was passed in the first initiative. *Id.* at 490. However, the Washington Supreme Court held that using the language that was previously held to be unconstitutional, to show the law as it was to be amended by the second initiative measure, was also unconstitutional. *Id.* at 490-92 ("[S]o long as a proposed law accurately sets forth the law it seeks to amend as it existed '*at the time of the legislature's action*,' then a later determination that the amended law is unconstitutional is immaterial. . .").

The Washington Supreme Court reaffirmed, as discussed in *Flanders* the two purposes of Washington's Art. II § 37, one of which is…

> …to ensure disclosure of the general effect of the new legislation *and* to show its specific impact on existing laws in order to avoid fraud or deception. Citizens or legislators must not be required to search out amended statutes to know the law on the subject treated in a new statute. Under article II, section 37, *a new statute must explicitly show how it relates to statutes it amends.* Thus, a significant purpose of article II, section 37 is to ensure that those enacting an amendatory law are fully aware of the proposed law's impact on existing law.

*Id.* at 491 (citations and internal quotes omitted, emphasis in original).

The mischief to be remedied by Mo. Const. Art. III § 28 is misleading those voting on or interested in a measure into believing the change is insignificant. The Washington

Supreme Court's specific concern was that as worded, the second initiative measure suggested that the statutory ceiling on yearly local tax rate increases was being lowered from 2% to 1%, which assumed the previously stricken law remained valid. The first initiative lowered the rate increase ceiling from 6% to 2%, but that amendment was invalid, leaving the original ceiling in place at 6%. The second initiative, therefore, was in fact cutting the ceiling from 6% to 1%, not from 2% to 1% as it appeared. *Id.* at 492.

The Court explained:

> Our holding today impacts only cases in which an amendatory statute inaccurately sets forth the law to be amended as measured *at the time of the operative vote.*"
>
> ***
>
> We acknowledge that only in rare cases will an amendatory initiative or bill be impacted by an intervening determination that the law to be amended is unconstitutional. However, in those rare circumstances, article II, section 37 protects legislators and voters by insisting that amendatory legislation *accurately* set forth the law to be amended as measured at the time of the enacting vote.

*Id.* at 495-96.

The *Washington Citizens* decision applies the rule which Missouri courts apply in all other situations wherein legislation is declared unconstitutional: the prior version of the law is given effect for all purposes. When the Revised Statutes are in error—as they apparently were at some point after HB 331 and HB 345 were held to be invalid—the earlier version of the Revised Statutes which correctly reflects the law as it exists absent the invalidated statutes must be the source of statutory language. S*tate ex rel. SSM*

*Health Care St. Louis v. Neill*, 78 S.W.3d at 143. The Revised Statutes are not scripture; they are only one source of evidence to show what the law is. Section 3.090.2, RSMo. See also *Bowen v. Missouri Pacific Railroad Co.*, 24 S.W. 436, 437 (Mo. 1893). The Revisor's decisions and actions in publishing the statutes cannot justify failing to follow the Constitution.

C. CONCLUSION

The members of the General Assembly, and/or the lobbyists and staff members who aided them, twice deprived the rest of the General Assembly and the public of bills which met constitutional requirements. In order to correct the second unconstitutional enactment of these measures in SB 649 and SB 650 this Court must reverse the trial court's judgment on the pleadings. It may also exercise its authority under 84.14 to enter the judgment the trial court should have entered, *Coldiron v. Missouri Department of Corrections*, 220 S.W.3d 371, 373 (Mo. App., W.D. 2007), which is holding SB 649 and SB 650 to be unconstitutional and invalid. That would fully dispose of this case.

POINT V

THE TRIAL COURT ERRED IN DISMISSING PLAINTIFFS' PETITION, THEREBY HOLDING THAT SHEETS LACKS STANDING TO CHALLENGE—UNDER MO. CONST. ART. X § 23 (THE "HANCOCK AMENDMENT")—THE STATUTES ENACTED BY SB 649 AND SB 650 IN BECAUSE THE TRIAL COURT THEREBY MISAPPLIED THE LAW IN THAT SHEETS HAS STANDING AS A RESIDENT AND TAXPAYER OF A POLITICAL SUBDIVISION AND BODY OF LOCAL GOVERNMENT, COLE COUNTY, BECAUSE COLE COUNTY IS ADVERSELY

IMPACTED FINANCIALLY BY THE REQUIREMENTS IMPOSED BY THESE LAWS AND THE STATE DOES NOT PROVIDE THE FUNDING AND RESOURCES FOR COLE COUNTY AND ALL OTHER IMPACTED POLITICAL SUBDIVISIONS TO COMPLY WITH THESE MANDATES.

The trial court ruled that Sheets lacks standing to assert a challenge to SB 649 and SB 650 as "unfunded mandates" in violation of Mo. Const. Art. X, § 21 of the Missouri Constitution, and dismissed on that basis. LF 249-50, A 81-82 (Judgment, p. 8, 9). In so ruling the trial court appears to have overlooked the presence of Richard Sheets as a plaintiff in this case. Sheets is a resident of Cole County and a taxpayer. LF 9, A 2 (Petition, ¶ 3).

A. THE STANDARD OF REVIEW.

The standard of review is *de novo* for a judgment on the issue of standing. See the authorities discussed in POINT I, section A, at page 15 of this brief.

B. DISCUSSION

In ruling against plaintiffs on the Hancock Amendment challenge to both SB 649 and SB 650, the trial court cites to *King-Willmann v. Webster Groves School District*, 361 S.W.3d 414, 416 (Mo. 2012). Only if Sheets or some other individual Missouri taxpayer were not party to this suit would dismissal be proper. *King-Willmann* holds only that political subdivisions (a school district)—not an individual—lack standing to bring suit under the Hancock Amendment, Mo. Const. Art. X, § 21. At this stage of the proceedings it was error to dismiss Sheets's claim for declaratory relief because Sheets's petition alleges and the text of sections enacted by SB 649 and SB 650 demonstrate that

these sections impose unfunded mandatory activity on Missouri cities and other political subdivisions, of which Sheets and other taxpayers like him are citizens. LF 16, 21, A 9, 14 (Petition, ¶¶ 38, 52).

Sheets' right to bring this action is protected by Mo. Const. Art. X, § 23, which states:

> **23. Taxpayers may bring actions for interpretations of limitations**
>
> Notwithstanding other provisions of this constitution or other law, any taxpayer of the state, county or other political subdivision shall have standing to bring suit in a circuit court of proper venue and additionally, when the state is involved, in the Missouri supreme court, to enforce the provisions of sections 16 through 22, inclusive, of this article and, if the suit is sustained, shall receive from the applicable unit of government his costs, including reasonable attorneys' fees incurred in maintaining such suit.

As applied to Sheets's Hancock claim challenging SB 649 and SB 650 as unfunded mandates, the Supreme Court held that local governments do not have standing, but "taxpayer plaintiffs do have standing" to assert claims under § 21. *Fort Zumwalt School District v. State*, 896 S.W.2d 918, 921 (Mo. banc 1995).

C. CONCLUSION

Sheets, as a taxpayer of the State of Missouri, and a taxpayer of one or more political subdivisions of the state impacted by SB 649 and SB 650, has standing to bring this Hancock Amendment challenge. The trial court's judgment and order dismissing

Sheets' Hancock Amendment claim under Mo. Const. Art X, § 21, should be reversed and the case remanded.

## CONCLUSION

The appellants pray that the Court reverse the trial court's judgment and either enter judgment under Rule 84.14 holding SB 649 and SB 650 to be invalid in their entirety because they were enacted in violation of Mo. Const. Art. III, § 28, or reverse and remand for further proceedings in the trial court.

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served electronically upon respondent on this 29th day of January, 2016, to James R. Layton, Solicitor General, Office of the Attorney General, Supreme Court Building, P.O. Box 899, Jefferson City, Missouri 65102-0899; james.layton@ago.mo.gov.

/s/ Michael G. Berry
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## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with Rule 84.06(b) and contains 10,464 words and 965 lines, excluding the cover, certificate of service, certificate of compliance, signature block and appendix; and that the brief contains words in 13 point Times New Roman.

/s/ Michael G. Berry
Michael G. Berry