SC96276

IN THE SUPREME COURT OF MISSOURI

CITY OF AURORA, MISSOURI, et al.
Respondents/Cross-Appellants

v.

SPECTRA COMMUNICATIONS GROUP, LLC d/b/a CENTURYLINK, et al.,
Appellants/Cross-Respondents

Appeal from the Twenty-First Judicial Circuit, St. Louis County, Missouri
Hon. David L. Vincent III and Hon. Tom W. DePriest Jr.

BRIEF OF AMICI CURIAE CHARTER FIBERLINK - MISSOURI, LLC, AND CHARTER ADVANCED SERVICES (MO), LLC

BERRY SILBERBERG STOKES PC
Robert P. Berry, #46236
David C. Baxter, #62165
16150 Main Circle Drive, Suite 120
St. Louis, Missouri 63107
Telephone: (314) 480-5881
Facsimile: (314) 480-5884
rberry@berrysilberberg.com
dbaxter@berrysilberberg.com

Counsel for Amici Curiae Charter Fiberlink - Missouri, LLC, and Charter Advanced Services (MO), LLC

I. TABLE OF CONTENTS

II. TABLE OF AUTHORITIES

Cases

Missouri Constitution Provisions

Missouri Statutes

III. STATEMENT OF JURISDICTION

This matter is based upon cross-appeals from several orders and judgments entered by Judge David Lee Vincent III and Judge Tom W. DePriest Jr. of the St. Louis County Circuit Court (the "Trial Court") on the claims of the City of Aurora, Missouri, the City of Cameron, Missouri, the City of Oak Grove, Missouri, and the City of Wentzville, Missouri (collectively, the "Cities") for, among other things, a declaratory judgment that money is owed under those Cities' respective business license ordinances. Legal File (hereinafter, "L.F.") at 204-42. The Trial Court granted final judgment in favor of the Cities by judgment and order dated February 23, 2017. L.F. at 10815. The defendants timely filed their initial Notice of Appeal on March 3, 2017 (L.F. at 10821), which was subsequently amended (L.F. at 10830, 10856). After timely filing a motion to amend the final judgment (L.F. at 10887) that was denied on April 25, 2017 (L.F. at 10945), plaintiffs timely filed their Notice of Appeal on May 5, 2017 (L.F. at 10946). Because these appeals rest in part on a challenge to a Missouri statute, this Court has exclusive jurisdiction over this appeal (as opposed to the Court of Appeals). Mo. Const. art. V, § 3. However, as laid out further below, the Trial Court lacked jurisdiction to enter the appealed rulings and, ultimately, this Court lacks jurisdiction.

IV. STATEMENT OF THE INTEREST OF THE AMICI CURIAE

This Court is now presented with its first opportunity to fully consider Missouri cities' use of equitable remedies to enforce their taxing ordinances and collect municipal license taxes – a process by which ***hundreds of millions*** of dollars belonging to Missouri residents have been swept into city coffers (and a percentage of which has wound up in

the pockets of private attorneys). Instead of following the constitutional and statutory rules for the enforcement of municipal license tax ordinances, cities are paying private attorneys millions of taxpayer dollars to act as their enforcers and increase their collections through equity claims and settlements. This means that the base, rate, and scope of Missouri municipal license taxes are being set not by the General Assembly, municipal authorities, and Missouri voters through the democratic process but by private attorneys seeking big paydays and service providers that rarely bear the ultimate burden of the tax in Circuit Courts that lack the original jurisdiction to even consider these disputes. Because nearly every service provider passes the burden of these taxes on to its customers, Missouri residents are seeing their taxes spiral ever upward without having a say in the matter. No appellate court has yet had the opportunity to review the substance of these improper tax policy changes because nearly every one of these cases has settled – this case is the first to go through to a final judgment. But this case underscores the simple truth that Circuit Courts never had the jurisdiction to hear these disputes in the first place – cities are bypassing the procedures set for them in the Missouri Constitution, Missouri statutes, and this Court's Rules in favor of their chosen method, collection by equity. This must stop. And this Court can stop it.

Amici Curiae Charter Fiberlink - Missouri, LLC ("Charter Fiberlink"), and Charter Advanced Services (MO), LLC ("Charter Advanced"), are Delaware corporations in good standing that provide interconnected Voice over Internet Protocol ("VoIP") service and related services (such as private line/dataWAN service) in well over one hundred cities in the State of Missouri, including plaintiff/respondent City of

Wentzville, Missouri. As such, Charter Fiberlink and Charter Advanced pay various taxes to the State of Missouri, to numerous county governments, and to the cities in which they provide service. Therefore, Charter Fiberlink and Charter Advanced each have an acute interest in the fair and equitable application of the revenue laws of the State, including the application of municipal business license ordinances. Charter Fiberlink and Charter Advanced are defendants in two cases much like this one, including *Collector of Winchester, Missouri*, *et al. v. Charter Communications, Inc. et al.*, which is now pending in the Circuit Court of the County of St. Louis and docketed as Case Number 10SL-CC02719, although instead of a few individual cities, Charter Fiberlink and Charter Advanced face a certified class of approximately 130 Missouri municipalities.[1]

As explained below, the cases facing Charter Fiberlink and Charter Advanced as well as the case before this Court are jurisdictionally defective. The heart of the cities' claims in these cases is that the service providers have violated the cities' license tax ordinances. Without this violation, the cities have no claim. And the Missouri Constitution has clearly established that these ordinance violation claims must be heard before a municipal judge, not a circuit judge. That ***did not happen here***—nor has it happened in the host of other similar cases, including the cases that have been brought

[1] In addition to this appeal and those faced by Charter Fiberlink and Charter Advanced, other similar cases include case numbers 2101CC-04454 (21st Judicial Circuit of Missouri), 22042-07870 (22nd Judicial Circuit), 22044-02645 (22nd Judicial Circuit), 11SL-CC04561 (21st Judicial Circuit), 12SL-CC00648 (21st Judicial Circuit), 12SL-CC01723 (21st Judicial Circuit), 14AC-CC00229 (19th Judicial Circuit), 14SL-CC04026 (21st Judicial circuit), 17SL-CC01945 (21st Judicial Circuit), 17SL-CC04332 (21st Judicial Circuit) among others. *See* L.F. at 76, 843.

against Charter Fiberlink and Charter Advanced. This clear constitutional prohibition must be enforced. Additionally, the cities' use of equitable proceedings to obtain wide-ranging declaratory relief, injunctions, and millions of dollars in "incidental" damages significantly skews the enforcement of tax laws in favor of the taxing authority and against the taxpayer. These equitable proceedings subject taxpayers to risks not present in the existing tax collection laws and also relieve the taxing authority of the procedural obligations under existing tax collection laws.

Charter Fiberlink and Charter Advanced have filed this Brief of Amici Curiae in order to bring these concerns to the Court's attention now so that it can enforce the clear constitutional and statutory prohibitions of these kinds of actions and put a stop to such *ultra vires* tax collection.

V. STATEMENT OF THE FACTS RELEVANT TO ISSUES PRESENTED FOR REVIEW

The City of Aurora, Missouri ("Aurora"), is a Missouri city of the third class. L.F. at 204. Aurora has a "business license" ordinance, codified as Aurora City Code §§ 615.010-615.050 (the "Aurora Ordinance"), directed at those "engaged in the business of furnishing exchange telephone service" within Aurora. L.F. at 207, 248-49. The Aurora Ordinance levies a tax of six (6.0%) percent "of the gross receipts derived from the furnishing of such service within the said City." L.F. at 248.[2]

The City of Cameron, Missouri ("Cameron"), is also a Missouri city of the third class. L.F. at 204. Cameron had a "business license" ordinance, enacted in 1962 and

[2] Aurora enacted ordinances 2006-2716 and 2006-2721 that may have altered the substance of Aurora's business license tax, but these ordinances were never presented to the Trial Court. L.F. at 248.

identified as Cameron Ordinance No. 2878 (the "1962 Cameron Ordinance"), directed at those "engaged in the business of furnishing exchange telephone service" within Cameron. L.F. at 207, 251-52. The 1962 Cameron Ordinance levied a tax of five (5.0%) percent "of the gross receipts derived from the furnishing of such service within said City." L.F. at 251. In 2006, Cameron enacted a replacement for the 1962 Cameron Ordinance, identified as Cameron Ordinance No. 5287 ("2006 Cameron Ordinance"). L.F. at 7704-7707. Cameron Ordinance No. 5287 is directed at those "engaged in the business of selling telephone or telegraph service . . . in the City." L.F. at 7705. The term "telephone" is defined to mean the same thing as "telecommunications service" in section 144.010 of the Missouri Revised Statutes. L.F. at 7704-7705. The 2006 Cameron Ordinance levies a tax of 1.3 percent "of the gross receipts from such business in the City." L.F. at 7705.

The City of Oak Grove, Missouri ("Oak Grove"), is a Missouri city of the fourth class. L.F. at 205. Oak Grove has a "business license" ordinance, codified as Oak Grove City Code §§ 615.010-615.060 (the "Oak Grove Ordinance"), directed at those "engaged in the business of supplying . . . telephone service . . . in the City of Oak Grove." L.F. at 207-08, 259-60. The Oak Grove Ordinance levies a tax of five (5.0%) percent "of the gross receipts from such business." L.F. at 259.

The City of Wentzville, Missouri ("Wentzville"), is also a Missouri city of the fourth class. L.F. at 205. Wentzville has a "business license" ordinance directed at those "engaged in the business of supplying . . . telephone service . . . in the City." That ordinance is codified as Wentzville City Code §§ 640.010-640.080 (the "Wentzville

Ordinance" and, together with the Aurora Ordinance, the 1962 Cameron Ordinance, the 2006 Cameron Ordinance, and the Oak Grove Ordinance, the "Cities' Ordinances"). L.F. at 208, 262-64. The Wentzville Ordinance levies a tax of five (5.0%) percent "of the gross receipts from such business." L.F. at 262. Wentzville's Ordinance states that this language shall not "be construed to apply to revenue derived from interstate telephone calls." *Id.*

Defendants Spectra Communications Group, LLC, Embarq Missouri, Inc., CenturyTel of Missouri, LLC, CenturyTel Long Distance, LLC, Embarq Communications, Inc., and CenturyLink, Inc. (collectively, "CenturyLink") or some subset of them provide certain services, including telephone services, to Missouri residents in Aurora, Cameron, Oak Grove, and Wentzville. *See* L.F. at 1738-1741, 9135.

On July 27, 2012, the Cities filed their Complaint in the Circuit Court of St. Louis County. L.F. at 40. As amended, the Cities' Complaint asserted, among others, claims under the Missouri Declaratory Judgment Act that CenturyLink violated each of the Cities' Ordinances by failing to include all of CenturyLink's services, including those services that are similar to old-fashioned "long distance" service, in its gross receipts tax calculation, and claims for money damages in favor of the Cities on account of CenturyLink's failure to pay such tax. L.F. at 213-245.

The Trial Court granted the Cities' motion for partial summary judgment on April 17, 2014, finding that the Cities' Ordinances apply to certain of CenturyLink's revenues from its business operations and that such taxes were not paid. L.F. at 1716. By order dated April 6, 2016, the Trial Court entered a further order with respect to the Cities'

motion for partial summary judgment, finding that the Cities' Ordinances apply to all of CenturyLink's revenues and that such taxes were not paid. L.F. at 9133-37. By order dated October 31, 2016, the Trial Court granted the Cities' motion for judgment on the pleadings, dismissing CenturyLink's counterclaims in the case. L.F. at 9757. After a bench trial conducted on December 5-7, 2016, the Trial Court entered judgment on February 17, 2017 against CenturyLink and in favor of the Cities. L.F. at 10815.

VI. POINTS RELIED ON

A. The Cities' ordinance violation claims should have been brought in the Cities' Municipal Courts.

The Trial Court erred in not dismissing the Cities' claims under the Cities' Ordinances because the Trial Court lacked jurisdiction to determine these claims, in that the Missouri Constitution vests exclusive jurisdiction to determine violations of municipal ordinances in Municipal Judges rather than Circuit Judges.

Yellow Freight Sys., Inc. v. Mayor's Com'n on Human Rights, 791 S.W.2d 382 (Mo. banc 1990)

City of Jackson v. Southard, 869 S.W.2d 280 (Mo. App. E.D. 1994)

Tupper v. City of St. Louis, 468 S.W.2d 360 (Mo. Banc. 2015)

Mo. Const. art. V, § 23

Mo. Rev. Stat. § 478.220

Mo. Rev. Stat. § 479.010

Mo. Rev. Stat. § 479.040

B. Declaratory judgment was improper because the Cities have an adequate remedy at law.

The Trial Court erred in sustaining the Cities' declaratory judgment claims, because the Trial Court does not have jurisdiction over declaratory judgment claims when the claimant has an adequate remedy at law, in that there are existing statutes that provide for the enforcement of delinquent tax obligations, and those statutes are the *exclusive* remedy available to the taxing authorities.

State ex rel. SLAH, LLC v. City of Woodson Terrace, 378 S.W.3d 357 (Mo. banc 2012)

State ex rel. Hayes v. Snyder, 41 S.W. 216 (Mo. 1897)

State ex rel. Steed v. Nolte, 138 S.W.2d 1016 (Mo. 1940)

Mo. Rev. Stat. §§ 94.150 and 94.310

Mo. Rev. Stat. § 139.031

Mo. Rev. Stat. §§ 140.060, 140.730, and 140.740

Mo. Rev. Stat. § 527.020

C. Enforcement of the Cities' Ordinances must be grounded in the specific language of the Cities' Ordinances and enabling statutes.

The Trial Court erred in enforcing the Cities' Ordinances without regard to the specific terms of those ordinances, because tax laws must be construed against the taxing authority and in favor of the taxpayer, in that the adoption of broader or more narrow language by the City governments must have some consequence.

Petrolene, Inc. v. City of Arnold, 515 S.W.2d 551(Mo. 1974)

Adams v. City of St. Louis, 563 S.W.2d 771 (Mo. banc 1978)

City of Lancaster v. Briggs, 96 S.W. 314 (Mo. App. 1906)

N.J. Bell Tel. Co. v. St. Bd. of Taxes and Assessments of N.J., 280 U.S. 338 (1930)

Mo. Const. art. X, § 22

Mo. Rev. Stat. § 71.610

Mo. Rev. Stat. § 77.080

VII. ARGUMENT

The Cities have cast aside the constitutional, statutory, and ordinance-based limitations upon their taxes and are making a massive revenue grab by expanding their taxes without voter approval through equitable claims in Circuit Courts. This approach raises a number of red flags. Primarily, the Cities' tax collection by equity approach calls into question the Trial Court's jurisdiction as well as this Court's. "In all appeals, this Court is required to examine its jurisdiction *sua sponte*." *Gash v. Lafayette County*, 245 S.W.3d 229, 231 (Mo. banc 2008) (quotation omitted). Parties "cannot confer subject matter jurisdiction upon a court where it does not exist. The only power a court without subject matter jurisdiction possesses is the power to dismiss the action." *City of Jackson v. Southard*, 869 S.W.2d 280, 282 (Mo. App. E.D. 1994) (internal citations omitted); *see also McLean v. First Horizon Home Loan Corp.*, 277 S.W.3d 872, 877 (Mo. App. W.D. 2009) (subject matter jurisdiction cannot be waived). Where the trial court lacks jurisdiction, the appellate court does as well. *Brock v. Blackwood*, 143 S.W.3d 47, 55

(Mo. App. W.D. 2004). Similarly, where equitable relief is improperly granted by the Circuit Court, there is no jurisdiction. *Gash*, 245 S.W.3d at 233.

When an appellate court is reviewing a judgment entered after a bench trial, such as the judgment in this case, it must reverse the trial court's judgment if "there is no substantial evidence to support it," if "it is against the weight of the evidence," if "it erroneously declares the law," or if "it erroneously applies the law." *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). Where, as here, the trial court erroneously applies the law, no deference is given to the judgment. *Corrington Park Assocs., L.L.C. v. Barefoot, Inc*., 983 S.W.2d 210, 212 (Mo. App. W.D. 1999). In this case, the Trial Court erroneously applied the law by deciding a case in which it had no jurisdiction, improperly sustaining claims under the Declaratory Judgment Act, and by failing to give weight to the actual language of the Cities' Ordinances. This Court owes no deference to the Trial Court's judgment in these respects.

A. The Cities' ordinance violation claims should have been brought in the Cities' Municipal Courts.

The Trial Court erred in not dismissing the Cities' claims under the Cities' Ordinances because the Trial Court lacked jurisdiction to determine these claims, in that the Missouri Constitution vests exclusive jurisdiction to determine violations of municipal ordinances in Municipal Judges rather than Circuit Judges.

The Trial Court should have dismissed the Cities' case outright because it lacks jurisdiction to determine the Cities' claims, all of which stem from the central allegation that CenturyLink violated the Cities' Ordinances. Under the Missouri Constitution, "a

municipal judge ***shall*** hear and determine violations of municipal ordinances." Mo. Const. art. V, § 23 (emphasis supplied); *see Yellow Freight Sys., Inc. v. Mayor's Com'n on Human Rights*, 791 S.W.2d 382, 384 (Mo. banc 1990). The Trial Court, of course, was not a municipal judge.

This mandate is not optional and is reflected in the structure of the Missouri courts established by the General Assembly. "Violations of municipal ordinances shall be heard and determined ***only*** by [municipal] divisions of the circuit court as hereinafter provided . . . ." Mo. Rev. Stat. § 479.010 (emphasis supplied). The "divisions of the circuit court" established in Chapter 479 are the municipal courts. Mo. Rev. Stat. § 479.020. Once a city elects to establish a municipal court, "all violations of that municipality's ordinances shall be heard and determined before a municipal judge." Mo. Rev. Stat. § 479.040(1)(1). Finally, "Circuit judges shall not hear and determine municipal ordinance violation cases, except upon trial de novo" or the judge is transferred or assigned to the case. Mo. Rev. Stat. § 478.220.

Cases predicated upon the determination of a violation of a municipal ordinance thus must be initiated and heard only before a municipal judge.[3] *See Yellow Freight Sys., Inc.*, 791 S.W.2d at 385; *City of Jackson v. Southard*, 869 S.W.2d 280, 281 (Mo. App. E.D. 1994) ("[g]enerally the Circuit Court lacks original jurisdiction over municipal

[3] This has long been the case. The 1945 constitution allowed the General Assembly to remove cases from the Circuit Court's jurisdiction, and it did so for ordinance violations. Mo. Const. art. V, § 14 (1945); *City of Ava v. Yost*, 375 S.W.2d 884, 885-86 (Mo. App. 1964). This jurisdiction was transferred from municipal corporation courts to today's municipal divisions (Mo. Const. art. V, § 27(2)(d)) and is reflected in the current constitution (Mo. Const. art. V, § 23).

ordinance violations.”*); accord City of Webster Groves v. Kurt*, 797 S.W.2d 494, 494 (Mo. App. E.D. 1990) (ordinance violation must first be tried in municipal court); *see also Tupper v. City of St. Louis*, 468 S.W.3d 360, 369 (Mo. banc 2015) (discussing the subject matter jurisdiction of a municipal judge).

This Court's holding in *Yellow Freight* is directly on point. In *Yellow Freight*, this Court affirmed the trial court's dismissal the plaintiff's claims based on violations of a municipal ordinance because those claims were not adjudicated in the municipal court. 791 S.W.2d at 384. The plaintiff was an employee of the defendant and alleged that the defendant discriminated against her on the basis of her handicapped condition in violation of an ordinance adopted by the City of Springfield. *Id.* at 383. That ordinance established the Mayor's Commission on Human Rights and granted it the power to determine violations under the anti-discrimination ordinance, as well as the power to award damages to parties injured by violations of the ordinance. *Id.* The Commission found that the defendant discriminated against the plaintiff in violation of the ordinance and ordered remedies. *Id*. The Commissions' decision was appealed to the Circuit Court in accordance with the ordinance, and the Circuit Court dismissed the claim. This Court affirmed that dismissal, reasoning that the claim was "predicated upon the determination of a violation of the ordinance" and could not be adjudicated by the Commission or any tribunal other than the municipal court. *See id.* at 385. The Court stated:

> This is a procedure to determine the violation of an ordinance which the constitutional provision, statute and rules provide *must* be initiated and heard before a municipal judge.

Id. (emphasis supplied). Therefore, this Court found that the Commission lacked jurisdiction to make the determination and affirmed the dismissal of the claim. *Id.*

For the same reason, the Trial Court in this case lacked jurisdiction to enter judgment in this case. There is no doubt that the Cities' claims are "predicated upon a determination of a violation of" the Cities' Ordinances if not outright violation prosecutions. *See id.* at 385. The Cities' argue in their seventh Point Relied Upon that "Defendants' failure to comply with the Cities' license taxes was declared unlawful and a violation of the Cities' ordinances." Respondents'/Cross-Appellants' Initial Brief filed Dec. 1, 2017 ("Cities' Brief") at p. 118; *see also* Cities' Brief at pp. 118-121. The Cities have been seeking these penalties from the beginning. L.F. at 212, 226-29, 242-43, 10961-70. Each of the Cities has established a municipal court under Chapter 479 of the Missouri Revised Statutes. *See* Aurora Code ch. 135; Cameron Code § 2-68; Oak Grove Code ch. 130; and Wentzville Code ch. 145. Alleged violations of the Cities' Ordinances should have been heard and determined "only" by the municipal courts established by the Cities. Mo. Rev. Stat. § 479.010. The Court should therefore reverse the judgment of the Trial Court and enter an order dismissing the case. *See Yellow Freight Systems, Inc.*, 791 S.W.2d at 385; *Southard*, 869 S.W.2d at 281.

B. Declaratory judgment was improper because the Cities have an adequate remedy at law.

The Trial Court erred in sustaining the Cities' declaratory judgment claims[4] because the Trial Court does not have jurisdiction over declaratory judgment claims when the claimant has an adequate remedy at law, in that there are existing statutes that provide for the enforcement of delinquent tax obligations, and those statutes are the *exclusive* remedy available to the taxing authorities.

The Cities should not have been permitted to proceed in any court with their declaratory judgment claims because the Cities have adequate remedies at law to enforce their rights under the Cities' Ordinances. *See State ex rel. SLAH, LLC v. City of Woodson Terrace*, 378 S.W.3d 357, 361 (Mo. banc 2012). An action for declaratory judgment is "not a general panacea for all real and imagined legal ills," and is "not a substitute for existing legal remedies." *Harris v. State Bank & Trust Co.*, 484 S.W.2d 177, 178 (Mo. 1972); *Van Dyke v. LVS Building Corp.*, 174 S.W.3d 689, 694 (Mo. App. W.D. 2005). In order for a claimant to maintain a claim for declaratory judgment, there "must be no adequate remedy at law." *SLAH*, 378 S.W.3d at 361.

[4] When a court's declaratory judgment power is improperly invoked because an adequate remedy already exists, that claim fails to state a cause of action. *Pref. Physicians Mut. Mgmt. Group, Inc. v. Pref. Physicians Mut. Risk Ret. Group*, 916 S.W.2d 821, 825 (Mo. App. W.D. 1995). The issue of whether a petition states a claim upon which relief can be granted is "inherent in every appeal and may be raised *sua sponte* by the reviewing court," even if not raised by the parties. *Shelton v. Shelton*, 201 S.W.3d 576, 579-80 (Mo. App. W.D. 2006).

1. Existing statutes governing tax collection are the exclusive remedy to collect delinquent taxes under the Cities' Ordinances.

The Cities have an adequate remedy at law under the existing statutes governing tax collection. *See SLAH*, 378 S.W.3d at 362. These enforcement mechanisms are the *exclusive* collection remedies available to the taxing authority. *State ex rel. Hayes v. Snyder*, 41 S.W. 216, 217 (Mo. 1897). This exclusivity has long been established in Missouri law. *See id.*; *State ex rel. George v. Dix*, 141 S.W. 445 (Mo. App. 1911). In *Hayes*, this Court held that:

> [a] tax is not a debt in the ordinary sense of that term, as it is not founded upon contract, and as a general thing a debt cannot be created in any other way. Tax proceedings are *in invitum*. The tax is an impost levied by authority of the government for the support of the state, and has none of the characteristics of a contract, the essence of which is an agreement expressed or implied. Therefore, if the statutes of this state make special provisions for the collection of taxes . . . and do not apparently contemplate that any others will be necessary, the mode of collection prescribed by statute is exclusive.

41 S.W. at 217. Under this "exclusive tax remedy" doctrine, Missouri courts have repeatedly refused to permit a Missouri taxing authority to seek *in personam* judgments against taxpayers, unless the particular tax law specifically so provides. *See Dix*, 141 S.W. 445 (Mo. 1911); *Kansas City v. Field*, 226 S.W. 27, 32 (Mo. 1920); *State ex rel. Steed v. Nolte*, 138 S.W.2d 1016, 1019 (Mo. 1940) (city must use tax collection procedures set forth in applicable statutes); *see also City of Manchester, Missouri v. S.W. Bell Tel. L.P.*, Case No. 4:04CV01308 HEA, 2005 WL 4673118, at *2 (E.D. Mo. Apr. 28, 2005).

The General Assembly provided a specific mechanism for the Cities to collect business license taxes, including those assessed under the Cities' Ordinances. Aurora and Cameron are cities of the third class (L.F. at 204) and as such are authorized to impose business license taxes by section 94.110 of the Missouri Revised Statutes.[5] The enforcement of those taxes by a third class city is governed by section 94.150 of the Missouri Revised Statutes, which provides:

> The enforcement of all taxes authorized by sections 94.010 to 94.180 shall be made in the same manner and under the same rules and regulations as are or may be provided by law for the collection and enforcement of the payment of state and county taxes, including the seizure and sale of goods and chattels, both before and after said taxes shall become delinquent . . . .

Oak Grove and Wentzville are fourth class cities (L.F. at 205) and their imposition of their ordinances is authorized by section 94.270 of the Missouri Revised Statutes.[6] Enforcement of these taxes is governed by section 94.310 of the Missouri Revised Statutes, which provides:

> The enforcement of all taxes authorized by sections 94.190 to 94.330 shall be made in the same manner as is provided by law for the collection and enforcement of the payment of state and county taxes, including the seizure and sale of goods and chattels after the taxes become delinquent. Where applicable in chapter 140, the term "county" shall be construed "city", the term "county clerk" shall be

[5] "Telephone companies" are among the various businesses upon which third-class cities are authorized to impose a license tax. Mo. Rev. Stat. § 94.110.

[6] "Telephone companies" are among the various businesses upon which fourth-class cities are authorized to impose a license tax. Mo. Rev. Stat. § 94.270.

> construed "city clerk", and the term "county collector" shall be construed "city collector" or other proper officer collecting taxes in the city.

These statutes each provide that the Cities "shall" enforce their ordinances "in the same manner as is provided… for the collection and enforcement of the payment of state and county taxes." Mo. Rev. Stat. §§ 94.150 and 94.310. State and county tax enforcement is governed, as explicitly indicated in section 94.310, by chapter 140 of the Missouri Revised Statutes. *See City of Manchester*, 2005 WL 4673118 at *3.

Chapter 140, titled "Collection of Delinquent Taxes Generally," has two mechanisms for the enforcement of delinquent tax obligations: one for real estate taxes, and the other for "personal taxes." The procedure for the enforcement of "personal taxes" (as opposed to real estate taxes) is set forth in sections 140.730 and 140.740. Section 140.740 requires the tax collector to "notify the delinquent taxpayer by regular mail, addressed to the last known address of such taxpayer, that there are taxes assessed against him, stating the amount due and the years for which they are due" at least thirty days prior to the commencement of an action to collect such taxes. Mo. Rev. Stat. § 140.740. Section 140.730 permits actions *in personam* against the taxpayer, but requires the submission of that tax bill, certified by the tax collector. Mo. Rev. Stat. § 140.730(2). Actions to collect "personal taxes" under section 140.730 are subject to a three-year limitations period. Mo. Rev. Stat. § 140.730(3). Chapter 141 contains other remedies for "delinquent taxes" that may apply.

The General Assembly, through the enactment of sections 94.110 and 94.270 of the Missouri Revised Statutes, authorized the Cities to enact business license taxes, and

through the enactment of sections 94.150 and 94.310, "made special provision for the collection of those taxes." *Hayes*, 41 S.W. at 217. Those special provisions give the Cities a limited menu of options to enforce the obligations of taxpayers— the existing statutory remedies available to county and State government. The modes of collection established by these statutes are therefore exclusive.[7]

2. The existence of these statutes forecloses the use of equity to collect municipal license taxes.

The existence of this exhaustive statutory scheme prevents the Cities from using equitable remedies like the declaratory judgment act to collect taxes. In *SLAH*, this Court dismissed a taxpayer's claim seeking declaratory judgment that an increase of a municipal business license tax was invalid. *See* 378 S.W.3d at 361. The taxpayer sought declaratory judgment, as the Cities have done in this case, under section 527.020 of the Missouri Revised Statutes, which provides:

> Any person . . . whose rights, status or other legal relations are affected by a . . . municipal ordinance . . . may have determined any question of construction or validity arising under the . . . ordinance . . . and obtain a declaration of rights, status or other legal relations thereunder.

This Court found that declaratory judgment could not substitute for the existing tax protest procedure under section 139.031 of the Missouri Revised Statutes, which is "generally the *exclusive* remedy for a taxpayer seeking to adjudicate the legality of an

[7] To the extent the Cities could have obtained any declaratory relief, they would be limited to a declaration that their tax applied to CenturyLink. *City of Jefferson City v. Cingular Wireless, LLC*, 531 F.3d 595, 600 (8th Cir. 2008). However, the Cities did not receive such a declaration in any of the appealed orders.

imposed tax." *SLAH*, 378 S.W.3d at 362 (emphasis supplied). The Court reasoned that the use of declaratory judgment as an alternate method to challenge a tax would permit taxpayers to evade the procedural requirements of section 139.031— including time limits and the requirement to pre-pay the assessed, but disputed, tax— which were specifically designed to "furnish an adequate and sufficient remedy to the taxpayer and, at the same time, to provide an expeditious method by which the various branches of government affected can obtain the revenue necessary for their maintenance without protracted delay." *Id.; citing B&D Inv. Co. v. Schneider*, 646 S.W.2d 759, 762 (Mo. banc 1983). The Court concluded that declaratory judgment would improperly expand the existing remedy, upsetting the balance of interests set by the General Assembly, and therefore held that the existing statutory remedy proscribed the declaratory judgment claim, and dismissed the case. *SLAH*, 378 S.W.3d at 364.

In this case, the Cities did exactly what the taxpayers tried to do in *SLAH* but from the opposite perspective. The rulings in this case show that the Cities did not really seek, and the Trial Court certainly did not provide, a declaration of the proper legal construction of the Cities' Ordinances as they relate to the modern telecommunications industry, as might be permitted under section 527.020. Instead, the Cities sought a declaration "that [CenturyLink] willfully violated" the Cities' Ordinances, and were therefore liable for money damages. L.F. at 1059. The Trial Court's first summary judgment order granted that declaration. L.F. at 1717. Declaratory judgment was thus used in this case not to obtain a declaration of the validity and scope of the Cities' Ordinances, but as a tool to collect delinquent taxes. L.F. at 1717.

Just as the use of declaratory judgment would permit a taxpayer to evade statutory requirements to protest a tax, the Cities' use of declaratory judgment in this case enabled them to circumvent the procedural requirements of the existing—and exclusive—statutory remedies for the collection of delinquent taxes. In so doing, the Cities relieved themselves of various procedural and evidentiary burdens set forth in those statutes. Under existing statutes, the Cities each would have been required to make an assessment of taxes due from CenturyLink, or to send CenturyLink a tax bill stating the sum claimed to be due, prior to the commencing the case. Mo. Rev. Stat. § 140.740. Three Cities have the right by ordinance to review CenturyLink's books and records to assist in this assessment. Cameron Code § 6-45; Oak Grove Code § 615.030; Wentzville Code § 640.030. Here, the Cities simply bypassed those requirements.[8] Likewise, under existing collection statutes, claims for delinquent taxes would have been subject to a three-year statute of limitations. Mo. Rev. Stat. §§ 140.160, 140.730(3). The Cities received a five-year limitations period instead. L.F. at 10815, ¶1.

The declaratory judgment action also deprived CenturyLink of procedural protections that would otherwise be available under section 139.031. Without a specific assessment or tax bill, CenturyLink could not make a payment under protest, subject to

[8] The hyper-aggressive approach taken by the Cities in this matter is reflected in their response, through their private counsel, to CenturyLink's request for a written demand to which CenturyLink could respond— something that the taxing authority is specifically required to provide under the tax statutes: "[Y]our request for a 'demand' to allow communications does not make sense in this context and creates an unnecessary burden as well having ended any argument regarding good faith communications toward compliance with local ordinances." L.R. at 679. This is not how tax authorities are supposed to act.

its right to challenge the tax without incurring interest and other penalties. The Cities' declaratory judgment action, which did not specify the sum claimed to be due, imposed the risk of interest and penalties on CenturyLink that the General Assembly specifically sought to avoid. *See Mesker Bros. Indus., Inc. v. Leachman*, 529 S.W.2d 153, 155 (Mo. 1975) (purpose of section 139.031 "obviously was to relieve the taxpayer of the payment of interest and penalties"). Finally, the use of the declaratory judgment procedure subjected CenturyLink to the risk of paying the Cities' attorneys' fees, a risk that does not exist under the existing statutory tax collection regime. L.R. at 10817-18, ¶6.

These differences are entirely at odds with the longstanding maxim that tax laws are to be "strictly construed against the taxing authority." *Office Depot, Inc. v. Dir. of Revenue*, 484 S.W.3d 793, 794 (Mo. banc 2016). The Cities' chosen enforcement procedure discourages the taxpayer from challenging the taxing authority's interpretation of a tax by subjecting the taxpayer to the risk of interest, penalties, and attorney's fees, and encourages the taxing authority to bypass the procedural burdens ordinarily associated with the assessment of taxes. This invites the taxing authority to make maximalist, extortionate demands. That incentive is further skewed by the Cities'

outsourcing of tax collection to private attorneys whose compensation appears to be a function of the total collected.[9]

Tax collection through declaratory judgment thus completely disrupts the balance established by the General Assembly between government's interest in raising revenue to fund its operations and the taxpayer's right to an "adequate and sufficient remedy" to government overreach. *See SLAH*, 378 S.W.3d at 362. Preservation of that balance led this Court to find the existing tax protest statutes to be the exclusive remedy for an aggrieved taxpayer and thus reject declaratory judgment as an alternate tax protest remedy. Preservation of that balance should likewise lead this Court to reaffirm its long-standing holdings that existing tax collection statutes provide the exclusive remedy for the taxing authority and thus reject declaratory judgment as an alternate tax collection mechanism.

C. Enforcement of the Cities' Ordinances must be grounded in the specific language of the Cities' Ordinances and enabling statutes.

The Trial Court erred in enforcing the Cities' Ordinances without regard to the specific terms of those ordinances and enabling statutes, because tax laws must be

[9] This perniciousness of the use of private tax collectors has been recognized since ancient times, including by the founders of our republic. *See* Franklin, Benjamin, *Rules for Reducing a Great Empire to a Small One* (1793) ("Let these [tax collectors] have large salaries out of extorted revenue"); Cicero, *The Verrine Orations Vol. 2, Book III § 32* (trans. L.H.G. Greenwood (1935)) (criticizing a regional governor for giving his tax collector "this full liberty to plunder the farmer by demanding as much as he chose and taking as much as he demanded . . . .")

construed against the taxing authority and in favor of the taxpayer, in that the adoption of broader or more narrow language by the City governments must have some consequence.

Municipal tax ordinances, like the Cities' Ordinances at issue in this case, must be construed "against the taxing authority and in favor of the taxpayer." *Adams v. City of St. Louis*, 563 S.W.2d 771, 775 (Mo. banc 1978), *rev'd on other grounds by Alumax Foils, Inc. v. City of St. Louis*, 939 S.W.2d 907 (Mo. banc 1997). In this case, the Trial Court made no effort to apply the specific language in the Cities' Ordinances and enabling statutes, but rather enforced them on an aggregated, summary basis, failing to make any findings with respect to the effect of the differences among the specific ordinances separately adopted by each City (save one).[10]

Municipal corporations have no inherent power to levy and collect taxes, but derive their powers to do so from the lawmaking power. Mo. Rev. Stat. § 71.610; *Petrolene, Inc. v. City of Arnold*, 515 S.W.2d 551, 552 (Mo. 1974), *rev'd on other grounds by Alumax Foils, Inc.*, 939 S.W.2d 907. "Consequently they possess only such power in respect thereto which has been granted to them by the Constitution or the statutes." *Id.*; *citing State ex rel. Emerson v. Mound City*, 73 S.W.2d 1017, 1025 (Mo. banc. 1934).

The specific language of the Cities' Ordinances differ with respect to what business is being taxed. Aurora and (in the Trial Court's view) Cameron both impose theirs on the furnishing of "exchange telephone service . . . within said City." L.F. at

[10] The Trial Court did correctly conclude that Wentzville could not collect on interstate services. L.F. at 10815-10816.

248-49 (Aurora Code § 615.010); L.F. at 251-52 (Cameron Ord. No. 2878). These ordinances, and many others like them across Missouri, are typically decades old and were adopted at a time when "exchange service" was understood to mean *only* local telephone service, as opposed to "long distance" service.

Indeed, the Court of Appeals held an early version, with language quite similar to the Cities' Ordinances, to specifically exclude long-distance service. *See City of Lancaster v. Briggs*, 96 S.W. 314 (Mo. App. 1906). That court held that the "gross receipts" subject to taxation were only those earned "within the present and future corporate limits of the city," and rejected the city's attempt to tax revenue from long-distance service. *Id.* at 315. During the period that the Aurora and Cameron Ordinances and others like them were enacted, a franchise tax on the gross receipts from long distance telephone service was specifically prohibited by federal law. *See N.J. Bell Tel. Co. v. St. Bd. of Taxes and Assessments of N.J.*, 280 U.S. 338, 346-47 (1930) (state could not impose any gross receipts tax on revenues from interstate business).

In contrast, Oak Grove and Wentzville have each modernized their ordinances, such that their tax is imposed on the gross receipts from "supplying . . . telephone service" in the City. L.F. at 259-60 (Oak Grove Code § 615.020); L.F. at 262-64 (Wentzville Code § 640.020). The Cities' Ordinances thus differ with respect to which gross receipts are being taxed, because the gross receipts subject to tax are determined by reference to the business being taxed ("exchange telephone" versus "telephone").

If the Trial Court were strictly construing the Cities' Ordinances "against the taxing authority and in favor of the taxpayer," as it was required to do, one would have

expected it to consider whether the Cities' Ordinances' differing descriptions of the business subject to tax signified a different base of revenue to be counted as "gross revenues." *See Adams*, 563 S.W.2d at 775. The Trial Court's failure to do so is glaring, particularly given the particular circumstances of Cameron's Ordinance.

The Cameron Ordinance enforced by the Trial Court is Ordinance No. 2878, and was adopted in 1962. L.F. at 251-52, 428. Ordinance No. 2878 taxes the gross receipts of firms providing "telephone exchange service," which was then considered to exclude all long-distance service, at the rate of 5.0%. Cameron repealed Ordinance 2878 in 2006, and adopted Ordinance 5287 in its place. L.F. at 7704. Ordinance 5287 expanded the description of the business subject to the tax, adopted a specific definition of "gross receipts," and reduced the rate of the gross receipts tax to 1.3%— broadening the tax base while reducing the tax rate.

Ordinance 5287 was evidently adopted in response to the enactment of the Municipal Telecommunications Business License Tax Simplification Act of 2005 by the Missouri Legislature. L.F. at 7704. That statute was found by this Court to be unconstitutional, and therefore "invalid in its entirety" although this Court rendered no opinion as to any specific ordinances. *City of Springfield v. Sprint Spectrum, L.P.*, 203 S.W.3d 177, 180 (Mo. banc 2006).

The Cities argued, and the Trial Court apparently agreed, that a "whereas" clause before the effective language of Ordinance 5287, which states that "in the event that said Act is not in effect for any reason, the City desires that its Municipal Code remain unchanged except as compelled by the Act," automatically repealed Ordinance 5287 and

re-adopted Ordinance 2878 upon the Court's decision. There is no evidence that the re-enactment of Ordinance 2878 complied with the many statutory requirements for the passage of ordinances (for example Mo. Rev. Stat. § 77.080), and the Trial Court made no explanation of how the City's expressed "wish" might override those requirements. Moreover, this "springing" ordinance, as enforced by the Trial Court, raised the tax rate applicable under Cameron's Ordinance from 1.3% to 5.0% without returning the base to its prior definition— an increase of 284%, without any input from voters, in apparent violation of the Hancock Amendment. Mo. Const. art. X, § 22.

The Trial Court's approach to the Cameron Ordinance, in which it adopted the expanded tax base of Ordinance No. 5287, but the higher tax rate of Ordinance 2878, demonstrates that it treated the actual language of the Cities' Ordinances as superfluous, and the careful consideration of that language as it relates to the complexities of the modern telecommunications industry an irritating burden.[11] The Trial Court simply aggregated the Cities' Ordinances, essentially finding that, whatever the business that is taxable might be in a particular City, CenturyLink engages in that business and no other business, and that any limits on what gross receipts might be subject to tax are irrelevant. L.F. at 9135, ¶10.[12] This problem grows exponentially in class action cases like the ones

[11] It is worth noting that this burden would be *greatly* diminished if the Cities had utilized their right, under each of the Cities' Ordinances, to inspect CenturyLink's books and records, and had made a specific tax assessment for the courts to review.

[12] At the hearing on the judgment held in chambers on February 14, 2017, the Trial Court said, in response to a question with respect to the composition of the judgment sums, "Those are the numbers that are going to be used. Court of Appeals can deal with the rest." (Trans. of Feb. 14, 2017 Judgment Hearing in Chambers, p. 3-4.)

faced by Charter Fiberlink and Charter Advanced. In addition, rather than considering which of CenturyLink's revenues are properly subject to each City's tax, the Trial Court simply determined that ***all*** revenues listed by the court and earned by CenturyLink with any connection to the city are subject to the tax. L.F. at 9135, ¶10, referring to the list of revenue types in an earlier discovery order, found at L.F. 2018. The Trial Court thus failed to construe each of the Cities' Ordinances strictly "against the taxing authority and in favor of the taxpayer." *Adams*, 563 S.W.2d at 775.

The Trial Court thus adopted the Cities' own willful ignorance of the Cities' Ordinances. The Cities argued below and continue to argue to this Court that their taxes apply to every penny that a service provider takes in. Cities' Brief at pp. 77-84. By adopting this reasoning, the Trial Court ignored the clear limitations in the Cities' Ordinances that the taxes are imposed only on (a) the provision of service (b) within each city. L.F. at 248, 251, 259, 262, 7705. The Trial Court's judgment should therefore be reversed.

VIII. CONCLUSION

For all of these reasons, the Trial Court's declaratory judgment that the Cities' violated the Cities' Ordinances, and are therefore liable for money damages, interest, and attorneys' fees to the Cities, should be reversed, and that the Cities are not entitled to penalties should be affirmed. Amici Curiae Charter Fiberlink and Charter Advanced prays an Order issue from this Court directing that the Trial Court's judgment be reversed in part and affirmed in part in this respect.

Dated: January 22, 2018

Respectfully submitted,

BERRY SILBERBERG STOKES PC

/s/ Robert P. Berry
Robert P. Berry, #46236
David C. Baxter, #62165
16150 Main Circle Drive, Suite 120
St. Louis, Missouri 63107
Telephone: (314) 480-5881
Facsimile: (314) 480-5884
Email: rberry@berrysilberberg.com
dbaxter@berrysilberberg.com

Attorneys for Amici Curiae
Charter Fiberlink - Missouri, LLC, and
Charter Advanced Services (MO), LLC

IX. CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief includes the information required by Rule 55.03 and complies with the requirements of Rule 84.06. The entire brief contains 8,902 words.

/s/ Robert P. Berry
Robert P. Berry